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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

No. 19 (ORIGINAL)

STATE OF ARIZONA, *Complainant*,

vs.

STATE OF CALIFORNIA, STATE OF NEVADA, STATE OF UTAH, STATE OF NEW MEXICO, STATE OF COLORADO, STATE OF WYOMING, AND RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, *Defendants*.

REPLY BRIEF AND ARGUMENT

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REPLY BRIEF AND ARGUMENT

(All italics are ours.)

(All references to "our former brief" refer to the brief of Colorado, New Mexico and Nevada.)

STATEMENT OF FACTS.

For the purpose of clarifying the argument to be made in reply to Arizona's brief, attention is called

to the following facts which have a material bearing upon all that is said or to be said by either ourselves or opposing counsel in respect to the issues raised by the bill of complaint and the motion to dismiss filed herein by the defendant States.

This is an Equity suit in which seven states of the United States of America and the head official of a subordinate department of the Executive Department of the United States government are parties.

The suit is bottomed upon the theory that a case of controversy exists between the State of Arizona, as Complainant, and the six other States, and the Secretary of the Interior, as the official head of the Department of the Interior, as Defendants, over which this honorable Court is authorized to assume jurisdiction by virtue of the constitutional provision which confers original jurisdiction upon it of suits between states and between states and the citizens of other states.

The Defendant States have filed a motion to dismiss the Bill.

The purpose of the complaint is to test the constitutionality of an Act of Congress and a six-State compact into which the defendant States have entered, with the consent of Congress, and the constitutionality of which Arizona seeks indirectly to have adjudicated by her effort, in this suit, to secure an injunction restraining the execution by said Secretary of said Act, which was passed by the Congress in the exercise of its governmental, legislative power.

July 3, 1930 "Congress appropriated the sum of $10,600,000.00 for the commencement of said Dam and incidental works," (Bill, page 23, par. XX.); and the Bill specifically alleges that said executive official has

"pursuant to and under color of said Act, seized and taken possession of all that part of the Colorado River which flows in Arizona and on the boundary thereof, and of all water flowing in said River * * * and of all dam sites and reservoir sites mentioned in paragraph X hereof, and now has said River and said water and said sites in his possession; has excluded and is now excluding the State of Arizona, its citizens, its inhabitants and property owners from said river, said water and said sites and from all access thereto," (Bill, pp. 32-33, par. XXX). That, "pursuant to and under color of said Act", said executive official has made surveys, plans and specifications for, and has commenced the construction of the dam, reservoir, power plant and other works provided for in said Act. That, "pursuant to and under color of said Act", said official has made and prescribed general regulations respecting contracts for the storage of water in said reservoir and for the delivery of water thereof for irrigation and domestic use, (Bill, pp. 33-34 par. XXXI), and that, "pursuant to and under color of said Act", he is otherwise carrying out the provisions thereof as shown in paragraphs XXXII and XXXIII on pages 34, 35 and 36 of the Bill.

The Congressional Act of which complaint is made clearly confers upon said executive official, general power and authority for the exercise of official discretion and judgment in executing its provisions. He is not only expressly empowered and authorized to exercise such discretion and judgment in selecting the site for the dam which the act authorizes him to construct and maintain and which site he has selected.

(Bill, par. I, page 59; page 80, sec. (3)); but, throughout the act, provisions are made, in minute detail, for the exercise of such discretion and judgment in his execution of said act.

It expressly appears on the face of the bill that in sec. I of the act of which complaint is made, congress has declared its purpose to be the improvement of navigation, etc. (Bill, page 58); and that in sec. 6 thereof it is expressly provided:

> "That the dam and reservoir provided for by sec. I hereof shall be used; first, for river regulation, improvement of navigation and flood control; second, for irrigation and domestic uses and satisfaction of present and perfected rights in pursuance of Article VIII of said Colorado River Compact, and, third, for power." (Bill, page 68.)

The ultimate general purpose and object sought to be accomplished by the bill is clearly shown by the prayer for relief, pages 39 and 40, and the specific ground of attack upon the constitutionality of the act in question, is shown in par. XXVIII, pp. 29, 30 and 31, as shown in our former brief.

The brief of complainant concedes, by failure to deny, our statement of the gravamen of the bill made on page 11 of our former brief, which is as follows:

> "The gravamen of the bill is that the Boulder Canyon Project Act is unconstitutional and void in that it:
>
> 'Is in excess of the powers granted to Congress by the Constitution of the United States' (Bill, p. 29), and that, its effect, if carried into execution by the Secretary of the Interior, will result in an invasion of Arizona's sovereign jurisdiction

and right to control the water and other natural resources of said State; of its right and those of its citizens, inhabitants and other property owners to appropriate and use said water and other natural resources, and of its sovereign authority and right to levy and collect taxes upon businesses and property used in connection therewith which, but for the operation of the Act, would be developed and result in 'great increase in population, wealth, prosperity and taxable resources of said State.'

"These allegations constitute the sum total of the allegations contained in the Bill upon which the complainant relies for the statement of a cause of action for equitable relief against the enforcement of the Boulder Canyon Project Act, and are epitomized and specified with particularity in par. XXVIII, pp. 29, 30 and 31 and par. XXXVI, pp. 38 and 39, which, read in connection with the prayer for relief at pages 39 and 40 of the Bill, clearly identify the kind of cause for relief in equity against the enforcement of the act upon which complainant has placed its whole reliance."

Instead of denying the foregoing statement, opposing counsel, while denying that the rights so alleged in their bill of complaint are political rights, confirm that statement in the most emphatic manner as follows:

On page 9 of their brief they say:

"It is a suit to enjoin an officer of the United States from executing and enforcing an unconstitutional enactment, which, if executed and enforced, will deprive the State of Arizona of its rights as a quasi sovereign State to regulate and control an appropriation and use of water within the State and of its right as a land owner to

appropriate such water for use on its own land, and will deprive other land owners in Arizona of their right to make similar appropriations and will thereby cause great and irreparable injury to the state and its inhabitants," (Bill, 20140).

On pages 21-22 they say:

"Recognizing the vital importance to the welfare and prosperity of the state of the waters within its boundaries, Arizona has exercised its *sovereign authority* over them by statutes which control the building of dams and the use and appropriation of water and forbid any of these acts without its consent. * * *

The object of the Bill is to restrain an individual from doing acts which it is alleged he has no authority to do, and which derogates from the sovereign authority of Arizona over water flowing within her boundaries, (Bill, 13-14)."

On page 23 they say:

"What has been said above shows clearly that the rights here asserted by Arizona are not political rights beyond cognizance of this Court, as is asserted by Colorado, Nevada and New Mexico."

Thus Arizona's own brief shows that the theory upon which she enters Court is not that the Boulder Canyon Project Act does not purport to confer authority upon the secretary to do the things the Bill alleges he is doing and intending to do, but that, because it does purport to so authorize him, the Act is unconstitutional and, for that reason, his actions are illegal—not because he is *exceeding*, by acting beyond, the authority so attempted to be conferred upon him,

but because the Congress, in its effort to confer such authority, has exceeded *its* constitutional authority, and, for that reason the Act is void. So, by Arizona's own statements it affirmatively appears that the object of the Bill is to secure a decision upon an abstract question in respect of the constitutionality of the Act, and not to enjoin an official who is acting beyond the scope of the authority which Congress has conferred upon him.

The gravamen of the Bill of Complaint is therefore apparent, and the question we have raised in respect of the jurisdiction of the Court over its subject matter is narrowed down to a contention on our part that the Bill seeks a decision upon an abstract question and that the rights which the complainant seeks to have protected by injunction against alleged, threatened injury, are political rights of which the courts cannot take judicial cognizance in an equity suit for the control of the legislative and executive departments of the United States Government; while opposing counsel assert that the object of the Bill is to secure the protection of quasi-Sovereign rights, of the same nature as those involved in, and justiciable for the same reasons that this Court entertained jurisdiction in such cases as Kansas v. Colorado, 206 U. S. 97; Georgia v. Tennessee Copper Co., 206 U. S. 230, and other like cases which will receive our attention as we proceed.

From the foregoing, we submit that, it is plain that the whole argument of opposing counsel upon this subject is based upon the major premise that Arizona is vested with "*Sovereign authority*" or "Sovereign jurisdiction and control of all water within its boundaries, including the water of the Colorado River and

its tributaries," as they, themselves, have stated in their brief on pages 21-22, as follows:

> "Recognizing the vital importance to the welfare and prosperity of the state of the waters within its boundaries, Arizona has exercised its *Sovereign authority* over them by *statutes* which *control* the building of dams and use and appropriation of water and forbid any of these acts without its consent," (Bill, 13-14), (Arizona's Brief pp. 21-22).

From the fact that she has so exercised her authority, as their premise from which to reason, opposing counsel have deduced the conclusion that the *effect* of the Boulder Canyon Project Act, if executed, will be an invasion of the State's Sovereign authority, jurisdiction and control of said water and other natural resources, and of the rights of the State, its inhabitants and property owners, which are dependent for existence upon, and incidential to that Sovereign authority, jurisdiction and control, and that the execution of the Act is illegal, because it "exceeds the powers granted to Congress by the Constitution and is unconstitutional and void," (Bill, 29), instead of being an illegal attempt on the part of the *Secretary* to exceed the authority conferred upon *him* by the Boulder Canyon Project *Act*.

But whether such Sovereign authority or jurisdiction and control is vested in that state, or in the Congress of the United States, we submit, clearly turns upon the determination, in the first instance, of a question of *fact* whether or not the river in controversy is a navigable or non-navigable stream, so that the question in respect of jurisdiction over the

subject matter of the Bill, which we have raised, depends upon the solution of a question of alleged *conflict* of sovereign authority or political jurisdiction to control the waters of said river as between Arizona and the Congress of the United States; and the existence of such sovereign authority, jurisdiction or control in either the one or the other of them depends upon the determination of whether the river is a navigable or a non-navigable stream.

PRELIMINARY OBSERVATIONS CONCERNING THE GOVERNING PRINCIPLES WHICH ENTER INTO THE CONSIDERATION OF THE MOTION TO DISMISS.

The United States of America is an entity which has been and now is endowed with the sovereign powers of a government "of the people, by the people and for the people", of the states of which it is composed.

While for some purposes "the people" are citizens of said states; for others, they are citizens of the United States, (Massachusetts vs. Mellon, 262 U. S. 447), and they are, in respect of the governments of either, supreme over each in their respective spheres of action. (Van Brocklin vs. Tennessee, 117, U. S. 151.

Each of said governments is composed of coordinate departments of government, and each of said departments within *its* appropriate sphere of action, is respectively, the *supreme representative* of, and responsible to, none save "the people" from whom *its* powers are derived, save and except only as it may be limited by the constitution under which its powers

are exercised, (Mississippi vs. Johnson, 4 Wall. 475, 71 U. S. 475; Georgia vs. Stanton, 6 Wall. 50).

Therefore, since, under our system of government, each of said governments is limited by constitutional provisions to action only through the agency of coordinate departments of government, and said departments are limited to action only through the agency of official heads of departments and subordinate departments, it not only follows, as a necessary consequence, that said respective governments and departments of government are responsible only to "the people" of whom they are composed, (except only as they are limited by their constitutions; but, likewise said official agents, in their exercise of governmental power or political jurisdiction, are responsible to none save "the people" for their compliance or lack of compliance with constitutional provisions under which their authority is exercised unless said constitution specifically places limitations upon the exercise of such authority by them). (Mississippi vs. Johnson, *supra;* Wisconsin vs. Duluth, 96 U. S. 379.) Therefore, the actions of such official representatives when so acting, instead of being their own actions, are, in effect, the acts of the government which they represent, (Louisiana vs. McAdoo, 234 U. S. 627).

Such being the facts and the governing principles which, we respectfully submit, are applicable thereto, it follows that, from every viewpoint, the Bill of Complaint is fatally defective.

We, therefore submit, in support of the proposition stated in our motion to dismiss and in reply to Arizona's brief, the following:

ARGUMENT.

The Bill of Complaint Does Not Present for Adjudication Any Case or Controversy of Which the Court Can Take Judicial Cognizance.

In keeping with our anticipations and in fulfillment of our expectations when our first brief was filed, in her answer, Arizona has attempted to shield her Bill of Complaint under the cover of such cases as Kansas vs. Colorado, 206 U. S. 46; Georgia vs. Tennessee Copper Co., 206 U. S. 230 and other like cases. But each and every of such cases were brought by quasi-sovereign States, suing in that capacity, for the protection of alleged quasi-sovereign state rights or interests which were *not* renounced by the states when they yielded to the Federal Government all authority to make war, enter into treaties and regulate commerce; but which under the Tenth Amendment to the Federal Constitution were "reserved to the states respectively or to the people"; and in each and every of said cases the Bill of Complaint conforms strictly to the clearly defined rule stated by this honorable Court in Florida vs. Mellon, 273 U. S. 12, at p. 16, wherein it is said:

> "While judicial relief sometimes may be granted to the quasi-sovereign state under circumstances which would not justify relief if a suit were between private parties, Georgia vs. Tennessee Copper Co., 206 U. S. 230-237, nevertheless, it must appear that the State has suffered a *wrong* furnishing a ground for *judicial* redress, or is asserting a right susceptible of *judicial* enforcement. The mere fact that the State is a Plaintiff is not enough."

What then are the rights of the states, as such, which are susceptible of judicial enforcement in this Court? We submit that they are such only as were reserved to the states by the Tenth Amendment and that no other than such rights were involved in the suits wherein jurisdiction was entertained by this honorable Court over such cases as Kansas vs. Colorado, and other like cases that are cited and relied upon in complainant's brief.

We further submit, that in each and every of said cases such quasi-sovereign States rights were alleged to have been invaded either by sister states or by individuals or corporations, and that none of them were made to depend upon a mere alleged conflict of authority between a State and the United States, as in the instant case.

We submit that this suit clearly is one between a quasi-sovereign State and a representative of the executive department of the Sovereign Government of the United States which involves an attack upon the constitutionality of an act, wherein the Congress of the United States has asserted sovereign, political jurisdiction and authority over a particular river for the declared purpose of improving its navigation, and which was enacted in the exercise of a purely legislative, governmental, political power which the states surrendered to Congress by the commerce clause of the Federal Constitution, for that purpose.

The only ground of attack upon the constitutional validity of this act is alleged without any uncertainty, as shown on page 11 of our former brief, and is confined to an allegation that said Act is in *excess* of the *powers granted* to *Congress*, (not the Secretary of the Interior), by the Constitution of the United States,

for the particular reasons specified on pp. 29, 30 and 31 of the Bill of Complaint. As also shown in our former brief, pp. 21 and 22, the Bill of Complaint nowhere attempts "to question the constitutionality of the *Act* upon the ground that, notwithstanding the unquestioned power of Congress to improve navigation, it *abused* that power by assuming to enact the Boulder Canyon Project Act for the declared purpose of improving the navigability of the Colorado River, when, in fact, 'it is not now and has never been a navigable river.'"

No attack whatever is contained in the bill of complaint against either the constitutionality of the act or the actions of the Secretary of the Interior in enforcing it, on the ground of any arbitrary abuse of any power, either legislative, executive, political or judicial, by either the Congress of the United States in enacting the statute, or by the Secretary of the Interior, representing the executive department of the Government, in executing it. Therefore, we submit that the distinction between such cases as the instant case and those cited and relied upon in complainant's brief is perfectly apparent, and clearly due to the fact that the rights reserved to the States by the Tenth Amendment are the only quasi-sovereign rights possessed by the States that are susceptible of judicial enforcement by original action in this court; while the right or power which Congress exercised in the enactment of the Boulder Canyon Project Act, and which is being executed by the representative of the executive department of the Government, is a sovereign right or power which *was yielded* to Congress by the Interstate Commerce clause of the Federal Constitution, and one which

has never been the subject for even a colorable issue since the decision of Gibbons vs. Ogden, 9 Wheat. 1. This decision was based upon the ground that acts of the legislature of a State, purporting to grant exclusive rights to navigate waters within the jurisdiction of the State of New York, were repugnant to that clause of the Constitution of the United States which authorizes Congress to regulate commerce.

Clearly the States were absolute sovereigns from the time of the closing of the Revolution until the adoption of the Federal Constitution, and, during that time, had absolute sovereign, political jurisdiction and control over navigable waters, within their boundaries; but by the Constitution they yielded that sovereign authority over navigable waters to the Congress of the United States. From that time the United States Government became the *owner* thereof, for the purpose of controlling navigation and thereby vested with the same sovereign, political jurisdiction and control thereover, as was possessed by the States themselves prior to the adoption of the Constitution.

In an early discussion of this subject, this honorable court, in South Carolina vs. Georgia, et al., 93 U. S. 4, at pp. 9-10, said:

> "Whatever, therefore, may have been their rights in the navigation of the Savannah River before they entered the Union, either as *between* themselves or *against others*, they both agreed that Congress might thereafter do everything *which is within the power* thus delegated. That the power to regulate inter-State commerce, and commerce with foreign nations, conferred upon Congress by the Constitution, extends to the control of navigable rivers between States,—rivers that are accessible from other States, at

least to the extent of improving their navigability,—has not been questioned during the argument, nor could it be with any show of reason. From an early period in the history of the Government, it has been so understood and determined. *Prior to the adoption of the Federal Constitution, the States of South Carolina and Georgia together had complete dominion over the navigation of the Savannah River. By mutual agreement they might have regulated it as they pleased.* It was in their power to prescribe, not merely on what conditions commerce might be conducted upon the stream, but also how the river might be navigated, and *whether it might be navigated at all.* They could have determined that all vessels passing up and down the stream should pursue a defined course, and that they should pass along one channel rather than another, where there were two. They had *plenary* authority to make improvements in the bed of the river, to divert the water from one channel to another, and to plant obstructions therein at their will. This will not be denied; but the power to 'regulate commerce', conferred by the Constitution upon Congress, *is that which previously existed in the States.* As was said in Gilman vs. Philadelphia, 3 Wall. 724, 'Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable rivers of the United States which are accessible from a State other than those in which they lie. For this *purpose* they are the *public property* of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep these open and free from any obstruction to their navigation interposed by the States, or otherwise; to remove such obstructions where they exist; and to provide, by such sanctions as they may deem proper,

against the occurrence of the evil and for the punishment of the offenders. For *these purposes* Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England.' Such has uniformly been the construction given to that clause of the Constitution which confers upon Congress the power to regulate commerce."

In all such cases, therefore, the only possible ground of conflict as between the States and the United States or its legislative and executive departments, is one which involves a purely political right, power or authority. In every such case the only right, power or authority that can be a subject in dispute is bound to be one in respect of the political right, power or authority of the Congress to govern and control, in the *exercise* of its *legislative judgment*, waters within the States of the United States. The only possible test for the determination of the right to exercise that right, power or authority in any particular case, necessarily consists in the exercise of legislative judgment of Congress upon the question whether, in a given case, a particular stream or body of water over which such control is to be or not to be asserted is or is not a navigable stream or body of water; or whether, if a non-navigable stream, property rights therein must be acquired as a prerequisite to the improvement intended. But as we shall attempt to show as we proceed, the Congress has complete jurisdiction and sovereign authority under the commerce clause to improve either navigable or non-navigable streams for the purposes of navigation, and that the only difference in its authority in such cases, respectively, is that in the one

case the power is unlimited, while in the other, it is limited by other provisions of the Constitution, and that, as a consequence, Congress may authorize the improvement of either kind of such streams, and that the only conditions with which it has to comply even in case of non-navigable streams are the constitutional limitations which guard and secure rights non-political.

The result is that in the exercise of, and as a necessary incident to, its exercise of this sovereign power, Congress must, in order to execute it at all, possess the power, jurisdiction and authority to determine and declare what waters are navigable waters over which it may, and, the manner in which it will, assume such jurisdiction and control.

In 45 C. J. 433-434 it is said:

> "Congress has power, which is paramount to that of the states, to make improvements in the navigable streams of the United States, and for this purpose *to determine* and *declare what waters are navigable.*"

And in Wisconsin vs. Duluth, 96 U. S. 379, it is said:

> "We do not feel called upon to make an argument to prove that these statutes of the Congress of the United States, and these Acts of the Executive Department in carrying those statutes into effect, constitute an adoption of the canal and harbor improvement started by the City of Duluth, and a taking of exclusive charge and control of it. That they amount to the *declaration* of the Federal Government, that we here interpose and assert our power; *we take upon ourselves the burden of this improvement, which properly belongs to us,* and that hereafter this

> work for the public good is in our hands and subject to our control. * * *
>
> "Nor can there be any doubt that such action is within the constitutional power of government."

Since, therefore, the Congress of the United States is a *political* department of that government and is authorized to determine and declare what waters are navigable, preliminary to an assertion of authority over them for the improvement of navigation, it follows as a necessary conclusion that, in so doing, it can only act by legislative determination and declaration, which always involves the exercise of judgment and discretion. Therefore, the power or jurisdiction so to determine and declare are purely political and not judicial; consequently, this power being a political power, and the members of Congress who exercise it, being the immediate and direct representatives of "the people", to whom alone they are answerable, their action in this respect is final and conclusive as against any action of the judicial department of the government, and, for that reason, this honorable Court has no jurisdiction over the subject matter of the Bill of Complaint in the instant case, (Mississippi vs. Johnson, *supra;* Wisconsin vs. Duluth, *supra,* and authorities cited in our first brief).

1. The Bill of Complaint Presents Nothing for Consideration Save an Alleged Conflict of Authority Between Arizona and the United States with Respect to the Colorado River.

The general statutes of Arizona to which reference is had in the Bill of Complaint, all relate to the con-

trol of the appropriation and use of the waters of the State in general and make no provision concerning the control or use of navigable waters either in general or in particular. On the contrary, the Boulder Canyon Project Act legislates with reference to the improvement of the navigation of a particular river, and the Act itself declares the purpose of Congress in its enactment to be the improvement of navigation.

While these respective statutes relate to subjects that are wholly distinct from each other, nevertheless the sovereign authority, jurisdiction, right or power exercised in each instance is clearly legislative, political and governmental.

Again, this conclusion would seem to be to apparent to require the citation of authority, but as against any possible contention to the contrary, we call attention to the following:

> Political power consists in: "the policy of government or its administration. Also, power exercised by a political department of a government;" and

Political rights are:

> "Those which may be exercised in the formation or administration of the government; the power to participate, directly or indirectly, in the establishment or management of the government; those rights which belong to a nation, or to a citizen, or to an individual member of a nation, so distinguished from civil rights, namely, local rights, of a citizen."
> 49 C. J. 1076-1077.

Then what are the nature of the rights claimed by Arizona on the basis of the alleged invalidity of the Boulder Canyon Project Act which it alleges would be infringed by its execution? Quoting the exact words of the complainant's brief and bill of complaint, we find the following:

On pages 21-22 of the brief it is said:

> "Recognizing the vital importance to the welfare and prosperity of the State of the waters within its boundaries, Arizona has exercised its *sovereign authority* over them by statutes which control the building of dams and the use and appropriation of water and forbid any of these acts without its consent (Bill, 13-14)."
>
> "The object of the bill is to restrain an *individual* from doing acts which it is alleged he has no authority to do, and which derogate from the *sovereign authority* of Arizona over water flowing within her boundaries."

And on page 31 in the bill of complaint it is alleged that:

> "Said act attempts to authorize the Secretary of the Interior on behalf of the United States * * * to deprive said State of its right to levy and collect taxes on * * * businesses and on property used in connection therewith."

We submit that each and every right so claimed is clearly political.

> "The use of water, especially for the irrigation and reclamation of land, is a public use in which the general public is interested. The State control of such uses is an exercise of police power." 3 Kinney on Irrigation, pp. 24-28, Sec. 1341, and cases cited.

Hoge vs. Eaton, 135 Fed. 411; 141 Fed. 64.
Henry vs. Roberts, 50 Fed. 902, 904.

"Police power is but another name for the power of government; it is subject only to constitutional limitations which allow a comprehensive range of *judgment*, and it is the province of the State to adopt by its legislature such policy as it deems best." (Syllabus.)
Mutual Loan Company vs. Martell, 222 U. S. 225.

The right or power to appropriate water under the authority of such legislation is *publici juris*, and political in its nature to the extent that one who, under such legislation, has been authorized to make such an appropriation may even exercise the power of eminent domain for the enforcement of such a right.

Clark vs. Nash, 198 U. S. 361.

So also is the right or power of a quasi-sovereign State to exercise dominion over the beds and waters of navigable streams, (in the absence of the exercise of the superior power of Congress), a power of government which is purely political.

"The soil under navigable waters being held by the people of the State in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning their use effects the public welfare. It is therefore appropriately within the exercise of the police power of the State."
Illinois Central Railroad vs. Illinois, 146 U. S. 387, 459.
Gray vs. Reclamation District, 174 California, 622; 163 Pac. 1024.

On the other hand, the power of the United States Government to legislate for the benefit of navigation necessarily involves the exercise of governmental, political power.

Jackson vs. United States, 230 U. S. 1, page 23.
United States vs. Chandler-Dunbar Water Power Co., 229 U. S. 53, 64.
Louis Bluepoint Company vs. Briggs, 229 U. S. 87-88.

We, therefore, submit that the bill of complaint in this case alleges no injury or threatened injury to any right whatever that is not a pure political right which is impossible of direct injury. It, therefore, in no sense conforms to the rule stated by Mr. Justice Sutherland in Florida vs. Mellon, supra, wherein it is said:

> "While judicial relief sometimes may be granted to a quasi-sovereign State under circumstances which would not justify relief if the suit were between private parties * * * nevertheless, it must appear that the State has suffered a *wrong* furnishing ground for *judicial* redress, or is asserting a *right* susceptible of *judicial* enforcement. The mere fact that a State is the plaintiff is not enough."

On the contrary, it presents for determination nothing save a question of *alleged conflict* of *authority* based upon a claim of alleged political rights for the exercise of political control over the Colorado River as between the Government of the United States and the Government of the State of Arizona.

But the authority and jurisdiction of each in re-

spect of such a river is wholly distinct and different from that of the other, and in each case depends for assertion upon the exercise of legislative judgment and discretion. And as between the two, the authority of Congress comes to it by way of constitutional grant and is the superior, plenary power or right which, when asserted by a legislative act, constitutes a supreme law of the land, anything in the Constitution or laws of the State to the contrary notwithstanding. As said by this honorable court in Union Bridge Company vs. United States, 204 U. S. 364, page 392:

> "All the causes concur in holding that the power of congress to regulate commerce and therefore navigation, is paramount and is unrestricted except by the limitations upon this authority by the Constitution. Of course, every part of the Constitution is as binding upon congress as upon the people. The guarantees prescribed by it for the security of private property must be respected by all. But whether navigation by waters over which congress may exert its authority requires improvement at all, or improvement in a particular way, are matters *wholly within its discretion;* and the judiciary is without power to control or defeat the will of congress so long as that branch of the Government does not transcend the limits established by the supreme law of the land."

In United States vs. Chandler-Dunbar Co., 229 U. S. 53, at pages 64-66, it is said:

> "So unfettered is this control of Congress over the navigable streams of the country that its judgment as to whether a construction in or over such a river is or is not an obstacle and a

hindrance to navigation, is conclusive. Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control.

"In Pennsylvania vs. Wheeling Bridge Company, 18 How. 421, 430, this court, upon the facts in evidence, held that a bridge over the Ohio River, constructed under an act of the State of Virginia, created an obstruction to navigation, and was a nuisance which should be removed. Before the decree was executed Congress declared the bridge a lawful structure and not an obstruction. This court thereupon refused to issue a mandate for carrying into effect its own decree, saying:

"'Although it still may be an obstruction in fact, it is not so in the contemplation of law. We have already said, and the principle is undoubted, that the act of the legislature of Virginia conferred full authority to erect and maintin the bridge, subject to the exercise of the power of Congress to regulate the navigation of the river. That body having in the exercise of this power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, State and Federal, which, if not sufficient, certainly none can be found in our system of government.'

"In Philadelphia vs. Stimson, supra, and in Union Bridge Company vs. United States, 204 U. S. 364, many of the cases are cited and reviewed and we need add nothing more to the discussion.

"The conclusion to be drawn is, that the question of whether the proper regulation of navigation of this river at the place in question required that no construction of any kind should be placed or continued in the river by

riparian owners, and whether the whole flow of the stream should be conserved for the use and safety of navigation, are questions legislative in character; and when Congress determined, as it did by the act of March 3, 1909, that the whole river between the American bank and the international line, as well as all of the upland north of the present ship canal, throughout its entire length, was 'necessary for the purposes of navigation of said waters and the waters connected therewith,' that determination was *conclusive*.

"So much of the zone covered by this declaration as consisted of fast land upon the banks of the river, or in islands which were private property, is, of course, to be paid for. But the flow of the stream was in no sense private property, and there is no room for a judicial review of the judgment of Congress that the flow of the river is not in excess of any possible need of navigation, or for a determination that if in excess, the riparian owners had any private property right in such excess which must be paid for if they have been excluded from the use of the same."

In United States vs. Duluth, et al., 25 Fed. Cases, page 923, Case 15001, it is said:

"It is, however, asserted that the states have a concurrent right to authorize improvements in the navigable waters of the United States in which their citizens are interested, so far as these waters lie within their territorial limits; and it is shown by affidavits, and by the statutes of Minnesota, that the canal here complained of is authorized by said state, and is important to her commerce, and is within her territory. That such a power can be exercised by the states may be admitted, when it does

not injure the general interest of commerce, and when it does not conflict with *any control assumed* by the federal government over the same locality.

"But all the reported cases which concede this power in the states agree that it exists only while the congress of the United States refrains from the assertion of its authority, and that, when the latter is called into exercise, it is not only paramount, but *exclusive*. Such is the principle asserted by the supreme court in Crandall vs. Nevada, 6 Wall. (73 U. S. 35), and in Gilman vs. Philadelphia, 3 Wall. (70 U. S. 713), and in Cooley vs. Board of Wardens, 12 How. (53 U. S. 299), in all of which the question is thoroughly examined."

Therefore, if in the judgment of Congress, any particular river or body of water is or may be the means of interstate or foreign commerce or of commerce with Indian tribes, and in the exercise of that judgment if Congress enacts a statute in which it declares its purpose to be to improve the same for the benefit of navigation, the question of the navigability or non-navigability of such stream or body of water, becomes material only to the extent that the determination of this question of *fact* has a bearing upon the question whether or not, Congress has authority to improve the stream without being subject to the limitations imposed by the Fifth Amendment or other provision of the Constitution; or whether, in subordination to the Constitution, proceedings in condemnation (in the absence of agreement) will be required as a prerequisite to the valid assertion of this plenary power. (U. S. vs. Cress, 243 U. S. 316, 326, and cases cited).

In the event such a stream is a navigable stream, no such proceedings are essential to the assertion of the power, because the United States is the owner of, and is vested with the actual title in and to such navigable waters for such purposes. (South Carolina vs. Georgia, 93 U. S. 1; U. S. vs. Chandler-Dunbar Co., 229 U. S. 53; Wisconsin vs. Duluth, 96 U. S. 379.)

In the event of the existence of any doubt upon the question of the navigability of a stream so proposed to be improved, necessarily Congress, in the exercise of its discretionary power, has authority to inquire into, determine and declare whether such stream is or is not a navigable one, over which it may assert jurisdiction, without the institution of proceedings in condemnation as shown by the authorities hereinbefore cited.

But in the event an interstate and international river, such as the Colorado River, is or may be the means of inter-state or foreign commerce, or commerce with Indian Tribes, and it should in fact be a non-navigable stream, that fact will not derogate from the power of Congress under the Constitution, by *appropriate means*, to make improvements in such a stream to benefit such commerce.

Wilson vs. Shaw, 204 U. S. 24, is a case which involved the authority of Congress under the commerce clause of the Constitution to construct and operate the Panama Canal and Railroad, and it is therein held that:

> "Under the commerce clause of the Constitution, congress has power to create interstate highways, including canals, and also those wholly within the territories and outside of State lines." (Syllabus)

In the course of the opinion, pages 33, 34 and 35, this court said:

> "PLAINTIFF contends that the Government has no power to engage anywhere in the work of constructing a railroad or canal. The decisions of this court are adverse to this contention. In California vs. Pacific Railroad Company, 127 U. S. 1, 39, it was said:
>
> "'It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress *has plenary power over the whole subject.* * * * Congress has likewise the power, exercised early in this century by successive acts in the Cumberland or National road, from

the Potomac across the Alleghanies to the Ohio, to authorize the construction of a public highway connecting several States. See Indiana vs. United States, 148 U. S. 148."

and on page 32 of the opinion, it is said:

"We have no supervising control over the political branch of the Government in its action within the limits of the Constitution. Jones vs. United States, 137 U. S. 202, and cases cited in the opinion; In re Cooper, 143 U. S. 472, 499, 503."

In such cases, however, the exercise of this power by Congress is subject to the guarantees prescribed by the Constitution for the security of private property and must be respected, (Union Bridge Company vs. United States 204, U. S. 364, 392); with the result that the appropriate means for the making of such improvements is by the enactment of statutes, wherein provision is made for the acquirement by agreement or by condemnation, of whatever rights of way and other property that may be essential to the accomplisment of the object intended, as was done in the enactment of the Boulder Canyon Project Act in the following words:

"That for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior,

> subject to the terms of the Colorado River compact hereinafter mentioned, is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canon; * * * and to acquire by proceedings in eminent domain, or otherwise, all lands, rights of way, and other property necessary for said purposes." (Bill, pp. 58-59.)

We, therefore, submit that by the enactment of this statute, the Congress of the United States has not only asserted control over the Colorado River for the declared purpose of improving its navigation, but in enacting the statute, it also made provision for the acquirement by proceedings in eminent domain or otherwise, of all lands, rights of way and other property necessary for the accomplishment of the purposes stated in the Act.

In so far, therefore, as the rights of Arizona in the beds or waters of said stream are concerned, if she has any *property* rights therein whereof she would be deprived as a result of the execution of this Act, in violation of the due process clause or other provision of the Constitution, certainly she is not without remedy; but this Bill of Complaint is framed upon no such theory. Its ground of attack against the constitutionality of the Act is limited to an allegation that the Act "is in excess of the powers granted to Congress by the Constitution" for certain specified reasons, all of which are based upon the major premise that Arizona has the sovereign jurisdiction and right to control the waters of the river, and not upon any allegation to the effect that rights of Arizona which are secured to it by the Tenth Amendment or any other provision of the Federal Constitu-

tion will be violated as the result of the execution of the Boulder Canyon Project Act.

It is therefore apparent that as respects the rights of Arizona, the Bill of Complaint presents nothing for the Court's consideration other than an alleged conflict of authority as between Arizona and the United States with respect to the control of the Colorado River, and that the only rights attempted to be asserted in the Bill are pure political rights which as stated by this honorable Court in Georgia vs. Stanton, 6 Wall. 50, 77, "are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, are presented by the Bill, in judicial form, for the judgment of the Court." They are, therefore, not subjects of judicial cognizance as held in that case and the other cases cited in our first brief; so, we submit, this case comes squarely within the principles stated by this honorable Court, speaking through Mr. Justice Sutherland in Florida vs. Mellon, 273 U. S. 12, at page 17:

> "If the act *interferes* with the exercise by the State of its full powers of taxation or has the effect of removing property *from its reach*, which otherwise would be within it, that is a contingency which affords no ground for judicial relief. The act is a law of the United States made in pursuance of the Constitution and, therefore, the supreme law of the land, the constitution or laws of the states to the contrary notwithstanding. *Whenever the constitutional powers of the federal government and those of state come into conflict, the latter must yield.* Ex parte Virginia, 100 U. S.

339, 346; Brown vs. Walker, 161 U. S. 591, 606; Cummings vs. Chicago, 188 U. S. 410, 428; Lane County vs. Oregon, 7 Wall. 71, 77."

"The claim of immediate injury to the state rests upon the allegation that the act will have the *result* of inducing potential taxpayers to withdraw property from the state, thereby diminishing the subjects upon which the state power of taxation may operate. The averment to that effect, however, affords no basis for relief, because, not only is the state's *right* of *taxation subordinate* to that of the general government, but the anticipated result is purely speculative to and, at most, only remote and indirect. * * * Plainly, there is no substance in the contention that the state has sustained, or is immediately in danger of sustaining, any *direct* injury as the result of the enforcement of the act in question. See In re Ayers, 123 U. S. 443, 496; Massachusetts vs. Mellon, 262 U. S. 447, 488."

"Nor can the suit be maintained by the State because of any injury of its citizens. They are also citizens of the United States and subject to its laws. In respect of their relations with the federal government 'it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status."

Massachusetts vs. Mellon, *supra*, pp. 487-486.

"It follows that leave to file the bill of complaint must be denied."

Likewise it comes squarely within the principles declared in Van Brocklin vs. Tennessee, 117 U. S. 151; wherein it is said:

"While the power of taxation is one of vital importance, retained by the States, not abridged

by the grant of a similar power to the government of the Union, but to be concurrently exercised by the two governments, yet even this power of a State is subordinate to and may be controlled by the Constitution of the United States. That Constitution and the laws made in pursuance thereof are supreme; they control the Constitutions and laws of the respective States and cannot be controlled by them. The people of a State give to their government a right of taxing themselves and their property at its discretion. But the means employed by the government of the Union are given by the people of all the States; and, being given by all for the benefit of all, should be subjected to that government only which belongs to all. All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a State extends to everything which *exists by its own authority*, or is *introduced* by *its permisson;* but *does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States.* The attempt to use the taxing power of a State on the means employed by the government of the Union, in pursuance of the Constitution, it itself an abuse, because it is the usurpation of a power which the people of a single State cannot give. * * * The States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government."

As shown hereinbefore, "Congress has power which is paramount to that of the State to make improvements in the navigable streams of the United States,

and for this purpose *to determine and declare what waters are navigable"* (45 C. J. 433-434); consequently, when in the enactment of the Boulder Canyon Project Act it declared the purpose thereof to be the improvement of the navigation of the stream, and by a representative of the executive department of the Government (upon whom the act conferred broad powers of discretion and judgment), in asserting full charge and control of said river and said waters to the exclusion of the State of Arizona, as alleged in paragraphs XXX, XXXI, XXXII and XXXIII of the Bill, it acted in the exercise of a "sovereign and supreme power within its appropriate *sphere* of action", (Wisconsin vs. Duluth, 96 U. S. 379; 45 C. J. 420, and cases cited), and its action in that respect conclusively binds this honorable court, for the reason that it constitutes a supreme law of the land, based upon a finding of fact which was a prerequisite to its enactment, and which constitutes a final determination of that question of fact "as fully and as effectually as a final judgment of a competent judicial tribunal of general jurisdiction would do in like cases," as will be shown in the course of the argument.

Said act having been passed by the Congress in the exercise of a power clearly *within* the *limits* of the powers *granted* to it by the constitution, it can not be said to be in *excess* of the powers so granted and must, therefore, be held to be a constitutional law of the land as against any attack made or that might be made in such a bill of complaint as that in the instant case or in any other bill that might be filed.

Whether or not the Colorado River is a navigable stream is wholly immaterial in the face of such an

assertion of power by Congress for the declared purpose of exercising an authority so clearly conferred upon it by the constitution. Whether that power has been rightfully or wrongfully asserted in a particular case, it is a power which the constitution clearly confers upon Congress, as shown hereinbefore, and its exercise in any case is a matter within its discretion and judgment, which, when exercised, is conclusive upon the courts, because such discretion and judgment are clearly political, (Mississippi vs. Johnson, *supra;* Wisconsin vs. Duluth, *supra*).

ALLEGATIONS IN RESPECT OF THE NAVIGABILITY OF THE COLORADO RIVER AND THE RECLAMATION OF PUBLIC LANDS.

Under the foregoing heading, in our first brief, from page 15 to page 21, we called special attention to certain allegations shown on pages 6, 7, 31 and 32 of the bill of complaint, for the distinct purpose of showing that, instead of said allegations having been made for the purpose of *stating a cause* of *action* or *ground* for *relief* in equity, they constitute a clear and deliberate attack upon the motive or purpose of congress in declaring its purpose when enacting the Boulder Canyon Project Act. Instead of attempting to answer the argument so made by us, under the heading: "The motions to dismiss admit Arizona's allegation that Colorado River is non-navigable. This is an allegation of fact, not a conclusion of law. If insufficiently pleaded, non-navigability is presumed," on page 46 of Arizona's brief it is said that: "Colorado, New Mexico and Nevada are asking the court to disregard Arizona's allegations that the Colorado River is not navigable, and to hold without allegation

or proof, that it is in fact a non-navigable river. They put this request upon the ground that the allegation of non-navigability is not an allegation of fact, but a mere conclusion of law."

This statement shows either a misconception or an attempt to evade the position taken and the question propounded in the brief of Colorado, New Mexico and Nevada. While they do ask the court to disregard the allegations of the bill to which reference is made, for the distinct reason that they were made for no other than the purpose of questioning the motive and purpose of Congress in declaring the purpose of the Act, they are *not* asking the court to make a finding of fact to the effect that the Colorado River "is in fact a navigable river"; but assert that Congress, having authorized the Secretary of the Interior to construct, operate and maintain a dam and incidental works, etc" * * * in the main stream of the Colorado River" for the declared purpose of improving its navigation, the court is bound, as a matter of law, by the *conclusive presumption* that the river is in fact a navigable river, over which Congress might rightfully assert sovereign control for that declared purpose, and that there is no justification for the court to look beyond the face of the Boulder Canyon Project Act to make any finding whatever in respect of the navigability of the Colorado River. Their position is that whether the Colorado River is or is not a navigable stream, this Honorable Court cannot look beyond the face of the Boulder Canyon Project Act (the provisions of which it must take judicial notice, as a matter of law), for the determination of any question of fact which was a prerequisite to the enactment of the statute. (Our first brief, page 21.)

Reference to our first brief, pages 15 to 21, will show that our discussion of the allegations shown at pages 6, 7, 31 and 32 of the bill of complaint, in respect to the navigability of the Colorado River, are for the sole and distinct object of showing that those allegations were not made for the purpose "of stating a cause of action for equitable relief against the enforcement or carrying out of the act of congress or the six state compact," but were "without equivocation made for the distinct purpose of questioning the *motive* and *purpose* of Congress in enacting the Boulder Canyon Project Act, (our brief, page 15); and "That in so far as these allegations are concerned, the bill does not even contemplate the statement of a cause of action or of an *issue* of *fact* relied upon by the complaint as a ground for relief in equity, but that these allegations were made for the sole purpose and with the distinct intent of laying a foundation for questioning the *motives* and *purposes* of Congress in enacting the Boulder Canyon Project Act." (Brief, page 20), which was done in no uncertain terms at pages 31 and 32 of the bill. (Our brief, page 15).

Again, at page 19 of our first brief:

> "We submit that it is apparent upon the face of the bill that no *issuable fact*, whatever in respect of the navigability of the Colorado River or the reclamation of public lands, is raised by the bill and that in respect of both * * * the allegations consist only in *argumentative statements* made for the purpose of laying the foundation for the *conclusions* that:
>
> (a) Because of said conditions, said river has never been and is not now a navigable river. (Bill, page 7);

(b) The recital in said Act that the purpose thereof is the improvement of navigation and the reclamation of public lands is a mere *subterfuge* and *false pretense.*" (Bill, 31.)

Notwithstanding the unmistakable intent and purpose of the foregoing statements quoted from our first brief, on page 46 of complainant's brief it is said concerning the supposed request which Arizona says we made, that we put said supposed request "upon the ground that the allegation of non-navigability is not an allegation of fact, but a mere conclusion of law", and that the authorities cited "in support of this contention, (pages 17, 18) did not in fact support it. No question of the navigability or non-navigability was involved in any of the cited cases." (Arizona's brief, pages 46, 47.)

We not only did not make any such request, but submit that the whole purpose, tenor and effect of our argument from page 15 to page 21 of our first brief, was to establish that the allegations of the bill to which reference was made, not only "do not state any issuable fact" but "that they were not intended to state a cause of action or even remotely relied upon as a ground for relief." (Our brief, page 16.)

The whole argument was framed and made upon the assumption that Arizona not only intended to attack the motives and purposes of Congress in the enactment of the statute, as she clearly did, but that she knew full well when the bill was framed, no issuable fact or cause of action for equitable relief could by any possibility be alleged by her on the basis of non-navigability of the Colorado River, for reasons that will be shown as we proceed.

Arizona's brief says: "that no question of the sufficiency or insufficiency of allegations of navigability was involved in any of the cases cited on page 18 of our first brief," except in certain of them "wherein the question was treated as a question of fact, and, without exception it has been so treated when it has arisen in this court." But those cases were not cited upon that theory at all, but for the purpose of supporting the proposition that any or all of the obstructions alleged on pages 6 and 7 of the bill of complaint might exist in fact without rendering the river a non-navigable stream, and that the existence or non-existence of such obstructions as are alleged in the bill do not furnish the true criterion by which the navigability or non-navigability of the stream is to be determined. The clear intent and purpose of these citations were, therefore, to show that the allegations shown on pages 6 and 7 of the bill of complaint, were not made for the purpose of raising an issuable fact but for the purpose of laying a foundation for questioning the motives and purposes of congress in its declaration of its purpose in enacting the statute.

Counsel for Arizona call attention to our citation of the case of Walker vs. Allen, 72 Ala. 456, which was cited in support of our statement on page 18 of our brief that "the allegations of this bill amount to nothing more than that the Colorado River is not a navigable stream," and for that reason could in any event be nothing more than the allegation of a pure legal conclusion.

Again, we simply credited opposing counsel with knowledge of this proposition of law, and made the statement for the purpose of showing that they,

legally, could *not* have made the allegations to which reference was made for the purpose of stating an *issuable* fact or a cause of action for relief in equity; but opposing counsel deduce from the Alabama case the conclusion that, because it is a prima facie presumption that streams above tide water are prima facie private—not navigable—in cases wherein an issue of fact is raised between parties litigant in a *judicial* proceeding, that rule applies to a case such as this, wherein Congress has, in the exercise of political power asserted control over a particular river and the complainant attacks the constitutionality of that action on the part of *Congress*. They state that:

> "Rivers not known to be navigable are generally presumed to be non-navigable and whoever asserts their navigability has the burden of proof.
>
> "It thus becomes unnecessary to consider whether in this case the non-navigability of the Colorado River has been sufficiently pleaded, since, if insufficiently pleaded, it will be presumed."

But this purports to be a suit to test the constitutionality, and enjoin the enforcement of, an act of Congress, the presumption in favor of the validity of which is so strong as to require such an act to be shown to be invalid beyond reasonable doubt.

As shown hereinbefore, no independent investigation of facts can be made by the court for the purpose of such decision because of the conclusive presumption that all facts prerequisite to enable Congress to act on such a subject were ascertained and determined prior to the enactment of the statute, and

as the Alabama Court says in *Walker vs. Alabama*, 72 Ala. 458:

> "When the facts are ascertained, whether a stream is navigable, is a question of law. The whole question is a mixed question of fact and law."

Consequently, since Congress is conclusively presumed, as a matter of law, to have ascertained and made a legislative determination of the fact that the Colorado River is a navigable stream by the enactment of the Boulder Canyon Project Act, the question whether the river is navigable has been reduced to a pure question of law by the enactment of the statute. There is, therefore, no issue involved in or that could be raised in respect of the navigability of the Colorado River by the bill of complaint filed in this suit upon which any presumption or finding of fact could be based by the court for the purpose of determining the constitutional validity or invalidity of the act of Congress in question, or of the actions of the Secretary of the Interior in executing it.

1. The Court is Bound by the Declaration of Purposes Contained in the Act and May Not Question the Motive or Purpose of Congress in Its Enactment.

On page 54 of complainant's brief it is said:

> "The court is not bound by the declaration of purposes contained in the act, but may determine its real purpose by considering its effect."
> "Even if the Colorado River were conceded to be navigable, it would still be necessary to in-

quire whether improvement of navigation is the purpose of the Boulder Canyon Project Act. The Act contains a recital that improvement of navigation is one of its purposes (Bill, 58), but the bill alleges that this is a mere subterfuge and false pretense. (Bill, 31.)

* * * * * * * * *

"Colorado, New Mexico and Nevada are asking the Court to disregard this allegation and to accept without qualification the declaration of purposes contained in the act. * * *

They "put their request upon the ground that Arizona is thereby attempting to question the 'motives' of congress. (Colorado Brief, 15, 20)."

It is especially to be noticed that according to the foregoing statements, our asserted request is said to have been put upon the ground that Arizona is thereby attempting to question only the "MOTIVE" of congress, when throughout our discussion of the subject from page 15 to 21 of our first brief, we use the words "motives and purposes".

It is also especially noticeable that the complainant's brief says that:

"Arizona is attempting to do no such thing. The allegation in question is aimed, *not* at the *motives* of Congress, but at the *purpose* and *effect* of the Act. The motives of Congress are nowhere mentioned or referred to."

Then they admit that the allegation is aimed at the purpose of the *Act*.

After having admitted the principle stated in Smith vs. Kansas City Title & Trust Co., 225 U. S. 180, 210 (Colorado Brief, 20), the brief says that:

"It does not follow, nor is it true, that when Congress has *exceeded* the *limits* of its constitutional authority, *it* may avoid judicial inquiry into the validity of *its* act by inserting therein a *false* declaration of purposes. State legislatures are likewise presumed to act with full knowledge and in good faith, as was held in United States vs. Des Moines Navigation & Ry. Co., 142 U. S. 510, 544, and Atchison, Topeka & Santa Fe R. R. Co. vs. Matthews, 174 U. S. 96, 104 (Colorado Brief, 21), but this does not preclude an inquiry as to whether the declared purpose of legislation is its true purpose." (Complainant's Brief, pages 54, 55.)

From the foregoing we submit that it is apparent that Arizona has with one breath drawn a clear cut distinction between an allegation which is aimed at the *motives* of *Congress*, and one that it is aimed at the "purpose and effect of the *act*"; and with the next, has, at least inferentially, assumed and asserted that *congress* has exceeded the limits of its constitutional authority, by inserting in the Act, a *false* declaration of purposes and thereby *attempted* to *avoid judicial inquiry* into the validity of the Boulder Canyon Project Act. We furthermore submit that this constitutes a plain assertion that such *false* declaration is to be and has been attributed to *congress* instead of to the *legislation* which congress has enacted, and that this assertion of itself, constitutes an admission, however unintentional, that "the *recital* (which Congress has made) in said act that the purpose thereof is the improvement of navigation and the reclamation of public lands *is* (itself) a mere subterfuge and false pretense, and is therefore in fact an attack upon the motive and purpose that Con-

gress entertained and in which it indulged when it made said *recital.*

Furthermore, the foregoing statements are immediately followed by the statement of the premise which Arizona has stated and assumed as its major premise upon which to base the whole argument made by it on pages 55 to 60 of its brief, as follows:

> "That this court is not bound by such *legislative declarations,* but may determine the true *purpose* of *legislation* by considering *its* effect is well settled." (Arizona's Brief, page 55.)

While it is true that courts may determine the true *purpose* of *legislation* by considering *its* effect upon the personal or property rights of others; that is an altogether different proposition from the one we propounded and discussed at length at pages 12 to 21 of our first brief, to wit; that courts cannot enter upon an independent inquiry as to the purpose or motive of the legislature or congress, when in its consideration of legislation concerning a particular subject it makes a declaration of the purpose or object which it intends to accomplish, through the agency of the executive department of the government, by the enactment of the legislation; and especially when that declaration of purpose constitutes and embodies a finding or legislative determination of *fact* which is a prerequisite to, and upon the existence or non-existence of which, the right or authority of the legislature to legislate upon the particular subject of the act depends.

We, therefore, submit that it is apparent upon the face of Arizona's own brief that the argument it has made is not only based upon the assumption that congress in its declaration of the purposes of the

Act was guilty of a "subterfuge and false pretense" by reason of which it exceeded the constitutional limits of its authority in enacting the Boulder Canyon Project Act, but that its major premise upon which that argument is bottomed, instead of meeting the issue we presented in our first brief, passes it by without answer and cites cases to support a false premise that has no bearing whatever upon the question we raised and presented in such detail in our first brief.

We again submit, as heretofore, that:

> "At pages 6, 7, 31 and 32, the bill contains allegations concerning the navigability of the Colorado River and the reclamation of public lands, which, instead of having been made for the purpose of stating a cause of action for equitable relief against the enforcement or carrying out of the act of congress or the Six States Compact, are, without equivocation, made for the distinct purpose of questioning the motives and purposes of congress in enacting the Boulder Canyon Project Act. * * *" (Our Brief, page 15).
>
> "That said allegations do not state any issuable fact and that they were not intended to state a cause of action or even remotely relied upon as a ground for relief, we submit is rendered doubly apparent by the further facts appearing on the face of the bill." (Our Brief, page 16.)
>
> "(4) Section I of the Boulder Canyon Project Act declares the purposes of congress in its enactment to be 'improving navigation * * * reclamation of public lands (etc)'. This declaration of purpose having been made by congress itself in enacting the statute, the court is bound by the conclusive presumption that any facts essential to the validity of the act did in fact

> exist at the time of its enactment, and if any special finding of these facts was required to warrant the passage of the act, for the purposes of this case, the fact that congress enacted the statute, and, in so doing, declared its purpose to be the improvement of navigation, is the equivalent of such a finding." (Our Brief, page 21.)

The paragraph last above quoted is the one to which reference is made on page 54 of the complainant's brief in the statements that "the act contains a *recital* that the improvement of navigation is one of its purposes, but the bill alleges *this* is a mere subterfuge and false pretense. * * * Colorado, New Mexico and Nevada are asking the court to disregard *this* allegation and to accept without question the declaration of purposes contained in the act."

In its further comments complainant's brief attempts to sidetrack the propositions involved in that paragraph by the half true assertions that:

> "State legislatures are likewise presumed to act with full knowledge and in good faith, as was held in United States vs. Des Moines Navigation and Ry. Co., 142 U. S. 510, 544, and Atchison, Topeka & Santa Fe R. R. Co., vs. Matthews, 174 U. S. 96-104. (Colorado Brief page 21); but this does not preclude an inquiry as to whether the declared purpose of legislation is its true purpose."
>
> "That this court is not bound by such legislative declarations but may determine the true purpose of legislation by considering its effect is well settled." (Complainant's brief, page 55.)

But these assertions neither state nor pretend to answer the propositions asserted in that paragraph,

the substance of which are that the final action of a legislative department of Government terminating in an act of legislation in due form, must of necessity presuppose and determine all facts prerequisite to the enactment of the legislation, and when such facts are so determined by such a legislative body, that determination must conclude further inquiry by all other departments of the Government.

It is true that in United States vs. Des Moines Navigation & Ry. Co., 142 U. S. 510, 544, to which complainant's brief refers, at page 544, it is said that:

> "The knowledge and good faith of a legislature are *not open* to question;"

but it does not stop there. It goes further and says:

> "It is *conclusively presumed* that a legislature acts with full knowledge and in good faith. It is true the bill alleges that its passage was induced by the navigation company, by false representations and threats of suits; but such an allegation amounts to nothing. In Cooley's Constitutional Limitations (5th ed. 222), the author, citing several cases, observes: 'From what examination has been given to this subject, it appears that whether a statute is constitutional or not is *always* a *question of power*; that is, a question whether the legislature in the *particular* case, in respect to the *subject matter* of the act, the *manner* in which its *object* is to be accomplished and the mode of enacting it, *has kept within the constitutional limits and observed the constitutional conditions.* In any case in which this question is answered in the affirmative the courts are not at liberty to inquire into the proper exercise of the power. They must assume that *legislative discretion* has been *properly exercised.* If evi-

dence was required, it must be supposed that it was before the legislature when the act was passed; and if any special finding was required to warrant the passage of the special act, it would seem that the passage of the act itself might be held to be equivalent to such finding. And, although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged, and annul their action if the allegations were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon." See also Fletcher vs. Peck, 6 Cranch, 87; Ex parte McCardle, 7 Wall 506; Doyle vs. Continental Insurance Co., 94 U. S. 535; Powell vs. Pennsylvania, 127 U. S. 678."

It will be noticed that the foregoing quotation from Cooley's Constitutional Limitations is made with approval and precludes the intimation contained in complainant's brief that the principle enunciated in that case was limited to the proposition that "State Legislatures are presumed to act with full knowledge and good faith." That the principle involved is not of limited application to the acts of State legislatures alone, but is applicable to the legislative acts of congress as well, we submit is a thoroughly established principle.

In United States vs. Des Moines, etc. Co., *supra*, at page 545, this court says further:

"And here the significance of this resolution is evident. It is passed by Congress after the settlement, proposed by the Iowa legislature of 1858, had been accepted by the navigation company, and deeds had passed in accordance there-

with. Its passage imports full knowledge of antecedent facts upon which it is based. In Powell vs. Pennsylvania, 127 U. S. 678, 686, referring to action had by the legislature of the State, this court said: 'The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record,' etc."

In *Chesapeake & Potomac Tel. Co. vs. Manning*, 187 U. S. 238, at page 245, this court said:

"Counsel for the company make these observations: 'And if the legislature cannot authorize a commission to fix rates without giving the corporations interested opportunity to be heard, it is hard to see how the legislature itself can do so, not only without giving an opportunity for a hearing, but, as is admitted to be the fact in this case, without making even any ex parte investigation.'

"But it is well settled that the courts always presume that the legislature acts advisedly and with full knowledge of the situation. Such knowledge can be acquired in other ways than by the formal investigation of a committee, and courts cannot inquire how the legislature obtained its knowledge. They must accept its action as that of a body having full power to act, and only acting when it has acquired sufficient information to justify its action."

In *Lusher vs. Scites*, 4 W. Va. 11, at page 14, it is said:

"The power to form new counties, it is conceded, belongs to the legislature alone under the constitution, but before this power can be right-

fully exercised, it must be made to appear affirmatively: 1. That the proposed new county does contain an area of at least four hundred square miles. 2. That no other county is thereby reduced below that area. (etc) * * * When all these facts are made to appear to the satisfaction of the legislature, then, and not till then, an act creating the proposed new county may be passed. The legal presumption therefore is, that when the act creating the county of Lincoln was passed, all these facts had been proved to the satisfaction of the legislature, otherwise that body would not and could not have passed the act. All its members were sworn to support the constitution of the State, and it is not to be presumed that they would violate their oaths of office by passing the act in question, without proof necessary to enable them to do so.

"Not only does the subject of making new counties belong to the legislature, but it belongs to no other department of the government. To exercise the power, the legislature must inform itself of the existence of the facts prerequisite to enable it to act on the subject. How it shall do so, and on what evidence, the legislature alone must determine and when so determined, it must conclude further inquiry by all other departments of the government; and the final action terminating in an act of legislation in due form, must of necessity presuppose and determine all the facts prerequisite to the enactment; and that too, as fully and as effectually as a final judgment of a competent judicial tribunal of general jurisdiction would do in like case."

De Camp vs. Eveland, 19 Barbour 81, was a case similar to the West Virginia case quoted from above. At pages 89-90, the New York Court says:

"The constitution declares that the legislative power of the state is vested in the senate and assembly. This legislative power is the very highest attribute of sovereignty, and its depository the embodiment and concentration of the whole political force of the body politic, with such restraints only as the charter of government has imposed. It is the lawmaking power, and, as heretofore remarked, superior to either of the other departments of government. The legislature are nowhere restrained, directed or limited in regard to the nature, grade or character of evidence which they must have as the basis of their action, or to guide them in their decisions. In some specified cases their power is limited, and in others conditional, depending upon the existence of certain facts. But they must necessarily decide whether such facts exist. Their general power to prescribe and regulate evidence for every other tribunal in the state has never been questioned, and it would present a singular anomaly if they were wanting in power to do the same for themselves, or to alter and change the same at pleasure; and it would be equally strange if any judicial tribunal in the state were permitted to review their decision upon the question of fact, on the existence of which their power to legislate in a particular case is made to depend. If such a thing were to be tolerated, it is not perceived why the existence of the fact in question may not and in many cases must not, be proper to be submitted to a jury. It is believed that but few would be bold enough to contend for a principle pregnant with such absurd results. In the present case it is contended that the legislature have assumed the existence of the fact, in reference to population, without evidence. But this does not appear, and is not to be presumed. On the contrary, we are bound to presume they acted upon good and

sufficient evidence; and this presumption, from the nature of the case, must be conclusive. That we are not in possession of the facts or the evidence of them, which the legislature had, amounts to nothing in the argument. It is rare, if ever, that a statute contains a recital of them, and is not necessary in any case."

The foregoing paragraphs are but a few applications of the general principles of constitutional law, which support the authority of legislative bodies to make a legislative determination of facts, in all cases wherein the constitutionality of a particular statute, depends upon the existence or non-existence of certain facts, and of the inability of courts to make an independent investigation of such facts, when called upon to judicially determine the constitutionality of such statutes.

In 6 R. C. L. pages 112, 113, these general principles are stated as follows:

"Legislative Determination of Facts.—On frequent occasions the constitutionality of a statute depends on the existence or non-existence of certain facts. In view of the presumption in favor of the validity of statutes, it must be supposed that the legislature had before it when the statute was passed any evidence that was required to enable it to act; and if any special finding of fact was needed in order to warrant the passage of the particular act, the passage of the act itself is treated as the equivalent of such finding. The validity of legislation which would be necessary or proper under a given state of facts does not depend on the actual existence of the supposed facts. It is enough if the law-making body may rationally believe such facts to be established. Under the American system of

government by the people through their chosen representatives, practical legislation admits of no other standard of action. The fact that the finding of the legislature is in favor of the truth of one side of a matter as to which there is still room for difference of opinion is not material. What the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. It has been said that any other basis would conflict with the spirit of the constitution, and would sanction measures opposed to a republican form of government. As a general rule, therefore, it may be stated that the determination of facts required for the proper enactment of statutes is for the legislature alone, that the presumption as to the correctness of its findings is conclusive, and that the courts do not have jurisdiction or power to re-open the question or make new findings of fact. The same principles have been applied in defining the function of the court in reviewing ordinances of municipal corporations.

"JUDICIAL DETERMINATION OF FACTS.—The constitutionality of a law is not to be determined on a question of fact to be ascertained by the court. If under any possible state of facts an act would be constitutional, the courts are bound to presume that such facts exists; and therefore the courts will not make a separate investigation of the facts, or attempt to decide whether the legislature has reached a correct conclusion with respect to them. * * *

"Under certain circumstances, however, questions of fact may be necessarily involved in a judicial determination as to the constitutionality of a statute, as where the validity of a law regulating the charges of a public service corporation depends on whether the rates so established amount under the particular circumstances of a

case to a taking of property without due process of law. * * * In such cases the general rule seems to be that where a party seeks to question the constitutionality of a statute upon a ground which involves a question of fact, he must in some appropriate way raise it in the trial court and present the testimony upon which he relies to establish such facts."

2. The Allegations in Respect of Navigability on Pages 6, 7, 31 and 32, of Complainant's Bill Do Constitute a Direct Attack Upon the Motive and Purpose of Congress in Its Enactment of the Boulder Canyon Project Act.

Complainant's brief at page 54 says:

"Arizona is attempting no such thing. The allegation in question is aimed not at the *motives* of *Congress*, but at the *purpose* and *effect* of the *act*."

In this manner she distinguishes between an allegation which is aimed at the motives of Congress and one which is aimed at a consideration of the effect of a statute enacted by Congress. In keeping with this distinction, she has assumed and stated her major proposition to be:

> "That this court is not bound by such legislative *declarations* but may determine the true purpose of legislation *by considering its* effect is well settled." (page 55.)

Thus, as shown hereinbefore, Arizona has ingeniously evaded the proposition propounded and discussed at length in our first brief at pages 15 to 21,

and in so doing, has attempted to escape the inevitable effect of an attack upon the motive and purpose of Congress in enacting the Boulder Canyon Project Act, and to secure a decision upon our motion to dismiss by an attempt to state a proposition which is a clear departure, not only from the proposition propounded by us, but from the alleged ground of unconstitutionality which she herself has made in her attack against the validity of the Boulder Canyon Project Act.

But, we submit that this ingenious distinction which she draws between an allegation aimed at the *motives* of *Congress* and an allegation made for the purpose of securing a consideration of the *effect* of a statute enacted by Congress, in no sense tends to refute the proposition which we propounded and discussed in our first brief; nor does it afford a way of escape from that proposition by its attempt to distinguish and assert the existence of a supposed distinction, between an attack upon the "*motives*" of *Congress*, and an attack upon the "*purposes*" of Congress, in making "such legislative declarations"; nor does it in any sense support the allegations upon which the bill of complaint attacks the constitutionality of the Act, to wit: that it is in *excess* of the powers granted to Congress, by the United States Constitution.

That an attack upon the "motives" of Congress and an attack upon the "purposes" of Congress, in making "such legislative declarations" are synonymous with each other and are attended by exactly the same legal consequences, we submit, is as thoroughly settled as is the proposition that this court may *determine* the true *purpose* of *legislation by considering its effect*.

In McCray vs. United States, 195 U. S. 27, at pages

53-56, the late Chief Justice White, in his masterly style, gave thorough consideration to this subject, and, in so doing, said:

> "For instance, all of the propositions obviously rest not only on inferences drawn from the face of the acts, but also on deductions made from what it is assumed must have been the motives or purposes of Congress in passing them. To avoid confusion and repetition we shall consider these distinct contentions separately, and we hence come, first, to ascertain how far, if at all, the *motives* or *purposes* of Congress are open to judicial inquiry in considering the power of that body to enact the laws in question. Having determined the question of our right to consider *motive* or *purpose*, we shall then approach the propositions relied on by the light of the correct rule on the subject of *purpose* or *motive*.
>
> "Whilst, as a result of our written constitution, it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, and therefore in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, no instance is afforded from the foundation of the government where an act, which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. To announce such a principle would amount to declaring that in our constitutional system the judiciary was not only charged with the duty of upholding the Constitution but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overthrow the entire distinction between the legislative, judicial and

executive departments of the government, upon which our system is founded, and would be a mere act of judicial usurpation.

"It is, however, argued if a lawful power may be exerted for an unlawful purpose, and thus be abusing the power it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this, that because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department.

"The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions. * * * *

"It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government where a wrong *motive* or *purpose* has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power. This was aptly pointed out in

Champion vs. Ames, 188 U. S. 321, where, speaking through Mr. Justice Harlan, it was said (p. 363):

> 'But if what Congress does is within the limits of its power, and is simply the limits of its power, and is simply unwise or injurious, the remedy is that suggested by Chief Justice Marshall in Gibbons vs. Ogden, when he said: "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."'

> "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful *purpose* or *motive* has caused the power to be exerted. As we have previously said, from the beginning no case can be found announcing such a doctrine, and on the contrary the doctrine of a number of cases is inconsistent with its existence."

The following cases are in full consonance with *McCray* vs. *United States, supra*:

Dakota Central Tel. Co., et al. vs. State South Dakota, et al., 250 U. S. 163, 184, 187.
Hamilton vs. Ky. Dist. Co., 251 U. S. 146, 161.
Powell vs. Pa., 127 U. S. 678, 685.
Ex Parte McCardie, 7 Wall. 506.
Fletcher vs. Peck, 6 Crouch 87.
McLean vs. Arkansas, 211 U. S. 547, 548.
C. B. & Q. R. R. Co. vs. McQuire, 219 U. S. 549 (569).

Green, et al. vs. Frazier, 253 U. S. 233 (239, 240).
Brushaber vs. Union Pac. R. R., 240 U. S. 1, 25.
Laurel Hill Cemetery vs. San Francisco, 216 U. S. 358.
Mutual Loan Co. vs. Martel, 222 U. S. 225.
Patton vs. Brady, 184 U. S. 608, 620, 621.
Flint vs. Stone Tracy Co., 220 U. S. 107 (167) 169.
Lottery case, 188 U. S. 321, 362, 363.

THE BILL OF COMPLAINT DOES NOT STATE A CAUSE OF ACTION FOR RELIEF IN EQUITY.

Since "the decisions of this court from the beginning, lend no support whatever to the assumption that the judiciary may restrain the exercise of *lawful power*, on the assumption that a wrongful *purpose* or *motive* has caused a power to be exerted," and, since as stated in *United States vs. Des Moines etc. Co.*, 142 U. S. at page 544, "it appears that whether a statute is constitutional or not is *always a question of power*," and the power of Congress to act, in every case, is to be determined by a decision of the question whether or not it acts, "within the limits of its constitutional authority," it follows as a necessary consequence, that the only question raised by the bill of complaint, as a ground of attack against the constitutionality of the Boulder Canyon Project Act, is that involved in the proposition that said act, "is in excess of the powers granted to Congress by the Constitution of the United States, and is unconstitutional and void," for the reasons specified on pages 29, 30 and 31 of the bill; and all of which are based upon the proposition that the "sovereign jurisdiction and right to control the water

and other natural resources of Arizona" are threatened by and will be injured by the execution of this act of Congress. But, since the rights so claimed by Arizona, on the basis of the invalidity of the act are, as shown hereinbefore, pure political rights, of which this court cannot take judicial coznizance, it follows, as a further necessary conclusion, that the bill of complaint does not state a cause of action for relief in equity.

Again, alleging, as it does, that Congress, through the agency of a representative of the executive department of the government, has taken full charge and control of the Colorado River and its waters, dam sites, reservoir sites; has excluded Arizona therefrom, and has commenced the work, and is now carrying out the provisions of the Boulder Canyon Project Act, the bill of complaint, on its face, affirmatively states facts which altogether preclude any court of equity from giving any consideration whatever to its prayer for relief. (See par. XX, page 23, par. XXX, XXXI, XXXII, XXXIII on pages 32, 33, 34, 35 and 36 of the bill.)

This honorable court has had occasion to pass upon an exactly similar state of facts. Wisconsin vs. Duluth, 96 U. S. 379, was a case in which "a bill in chancery was filed in this court by the State of Wisconsin, by virtue of the constitutional provision which confers upon the court jurisdiction of suits between the States and between a State and citizens of other States," in deciding this identical question Mr. Justice Miller, in delivering the opinion of the court, said:

> "The present suit was brought by the State of Wisconsin, on the ground that the *channel* of the

St. Louis river, as it flowed in a state of nature, *was the common boundary* between that State and the State of Minnesota, and that she has an interest in the *continuance* of the channel as an important highway for navigation and commerce in its natural and usual course. That the canal cut by Duluth across Minnesota Point, deeper than the natural outlet of the St. Louis River at its mouth, has diverted, and will continue to divert, the current of the river through Superior Bay into the lake by way of that canal. That the result of this is, that while the current cuts that canal deeper and gives an outlet for the water there at a lower level, it at the same time, by diverting this current from the old outlet; causes it to fill up, and thus destroys the usefulness of the river and bay as an aid of commerce, on which the State had a right to rely. The bill, after reciting the facts which we have already detailed, insists that the city of Duluth cannot, by any right of her own nor by any authority conferred on her by the State of Minnesota, thus divert the waters of the stream—the St. Louis River—from their natural course, to the prejudice of the rights of the State of Wisconsin or of her citizens. It declares that this canal at Duluth does this in violation of law; and it prays of this court to enjoin Duluth from protecting or maintaining it, and by way of mandatory injunction to compel that city to fill up the canal and restore things in that regard to the condition of nature in which they were before the canal was made. * * *

"The answer also sets up, as an affirmative *defence* to the *relief sought by the bill, that the United States, by the legislative and executive departments of the government, have approved of the construction of the canal, have taken possession and control of the work, have appropriated and spent money on it, and adopted it as the best mode of making a safe and accessible harbor at*

the western end of the great system of lake navigation.

"Many very interesting questions have been argued, and ably argued, by counsel, which we have not found it necessary to decide. The counsel for defence deny that the State of Wisconsin has any such *legal interest* in the flow of the waters in their natural course as authorizes her to maintain a suit for their diversion. It is argued that this court can take *cognizance* of no question which concerns *alone* the rights of a State in her *political* or *sovereign* character. That to sustain the suit she must have some proprietary interest which is affected by the defendant. This question has been raised and discussed in almost every case brought before us by a State in virtue of the original jurisdiction of the court. We do not find it necessary to make any decision on the point as applicable to the case before us. * * *

"*We will first consider the affirmative defence already mentioned; for, if that be found to be true in point of fact, it will preclude any such action by this court as the plaintiff has prayed for.*

"It is to be observed, as preliminary to an examnation of the acts of the general government in the special matter before us, that the whole system of river and lake and harbor improvements, whether on the sea-coast or on the lakes or the great navigable rivers of the interior, has for years been mainly under the control of that government, and that, whenever it has taken charge of the matters, its right to an exclusive control has not been denied. The *operation* of the *government* in this regard have been conducted by the bureau of engineering, as part of the War Department, to which *Congress has confided* the execution of *its wishes* in all these matters. That *department has mapped* out in suitable geographical divisions the work thus imposed upon it, and placed these under the control of officers who are in charge of them. These are again subdivided, so that while the lake system,

or, at all events, the western lake system, is in the charge of one general superintendent, the separate works which at different places are conducted under him have each another engineering officer, who has special charge of those works.

"For many years past, Congress has been in the habit of passing an annual appropriation bill, called the river and harbor bill, devoted to works of this class exclusively; and in these bills it appropriates specific sums to specific works, either already commenced and unfinished, or for new works thereby authorized, or sums necessary for the safety and protection of works already in existence. The money thus appropriated is expended, as we have said, under the direction of the War Department. *It cannot be necessary to say that when a public work of this character has been inaugurated or adopted by Congress, and its management placed under the control of its officers, there exists no right in any other branch of the government to forbid the work, or to prescribe the manner in which it shall be conducted.* * * *

"We do not feel called upon to make an argument to prove that these statutes of the Congress of the United States, and these acts of the Executive Department in carrying those statutes into effect, constitute an adoption of the canal and harbor improvement started by the city of Duluth, and a taking exclusive charge and control of it. *That they amount to the declaration of the Federal Government, that we here interpose and assert our power.* We take upon ourselves the burden of this improvement, which *properly belongs to us*, and that here after this work for the public good is in our hands and subject to our control. * * *

"If, then, Congress, in the exercise of a lawful authority, has adopted and is carrying out a system of harbor improvements at Duluth, this court can have no lawful authority to forbid the work. If that body sees fit to provide a way by which the great commerce of the lakes and the countries

west of them, even to Asia, shall be securely accommodated at the harbor of Duluth by this short canal of three or four hundred feet, can this court decree that it must for ever pursue the old channel, by the natural outlet, over water too shallow for large vessels, unsafe for small ones, and by a longer and much more tedious route?

"When Congress appropriates $10,000 to improve, protect, and secure this *canal*, this court can have no power to require it to be filled up and obstructed. While the engineering officers of the government are, under the authority of Congress, doing all they can to make this canal useful to commerce, and to keep it in good condition, this court can *owe no duty* to a State which requires it to order the City of Duluth to destroy it.

"These views show conclusively that the State of Wisconsin is not *entitled to the relief asked by her bill and that it must, therefore, be dismissed with costs.*"

The Boulder Canyon Project Act confers upon the Secretary of the Interior, powers of discretion and judgment, placing in his hands authority to select the site for the dam. (Bill pages 58, 59, which he has done, Bill page 80.) These powers are as clearly executive and political as those of the Congress are legislative and political; so that, whether the bill of complaint is to be considered from the viewpoint of a lack of jurisdiction on the part of the court over the subject matter of the bill, or from the viewpoint of a failure of the bill to state a cause of action for relief in equity, it is clearly fatally defective.

The question of the jurisdiction of the judicial department of government to interfere with the exercise of discretion on the part of the legislative and executive departments of government found early expres-

sion in the case of Mississippi vs. Johnson, 4 Wall. 475; 71 U. S. 475.

In the syllabus the court said:

> "The President of the United States cannot be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional, nor will a bill having such a purpose be allowed to be filed."

The case involved the distinction between a ministerial duty and one requiring the exercise of discretion. In this case the court clearly makes the distinction and defines the jurisdiction of the court in such cases.

Quoting from the decision:

> "A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law."

Citing Marbury vs. Madison, 1 Cranch 137, and others:

> "In each of these cases, nothing was left to discretion. There was no room for the exercise of judgment. * * *"

Continuing the court said:

> "Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws are the acts named in the bill. * * * The duty thus

imposed on the President is in no sense ministerial. It is purely executive and political."

"An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as 'an absurd and excessive extravagance.'

"It is true that in the instance before us the interposition of the court is not sought to enforce action by the executive under constitutional legislation, but to restrain such action under *legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion.*"

"The Congress is the legislative department of government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed are, in proper cases, subject to its cognizance."

The motion for leave to file the bill was denied.

The doctrine laid down in this case has been approved and applied in numerous cases. To cite some of the leading ones:

In Gaines vs. Thompson, 74 U. S. 347, 353, the court says:

"Accordingly, in the case of the State of Mississippi, which was an application to this court for the writ of injunction in the exercise of its original jurisdiction, the court says that it is unable to perceive that the fact that the relief asked is by injunction takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion."

To the same purport are 106 U. S, United States vs. Lee, 196, 222; Wisconsin vs. Pelican Ins. Co., 127 U. S. 265, 297. In the case of Taylor vs. Karcheval, 82 Fed. 497, Dist. Ind. 91, the court uses this emphatic language on page 499:

> "It is firmly settled that courts of chancery concern themselves only with matters of property and the maintenance of civil rights. Such courts have no jurisdiction in matters of an *executive* or *political nature;* nor do they interfere with the duties of *any department of the government* except under special circumstances and then only when necessary to the protection of rights of property; nor can they interfere to restrain criminal or immoral acts unless they affect or threaten to invade property rights."

Citing in re Debs 158 U. S. 564; Luetier vs. Borden, 7 Howard 1; Mississippi vs. Johnson, 4 Wall. 475, and others. This case was cited with approval in Anthony vs. Burrow, 129 Fed. 783, 790; American School Healing vs. McAnnually, 102 Fed. 566; Lane vs. Anderson, 67 Fed. 563, 566.

See also State of Louisiana vs. McAdoo, 234 U. S. 627, a recent decision emphasizing the doctrine laid down in 4 Wall. 475.

In the Kodiak 53 Fed. 126, 130, it is said:

> "How then did it happen that he received such orders? *It must be presumed* I think, that they were given in the assertion on the part of this government of territorial jurisdiction over these waters, and if I am correct in this, then it is not the province of courts to participate in the discussion of the questions arising out of this *clause* of *jurisdiction* or *dominion*, for they are of a

political nature, and *not judicial.* National dominion and sovereignty may be extended over the sea as well as over the land, and in our government, *when Congress and the President assert dominion* and sovereignty over any portion of the sea, or over *any body of water,* the *courts are bound by it.*"

ARIZONA DOES NOT COME INTO THIS COURT WITH CLEAN HANDS. BY HER OWN REPRESENTATIONS MADE FOR THE PURPOSE OF INDUCING THE CONGRESS TO TAKE CONTROL FOR THE PURPOSE OF IMPROVING THE NAVIGABILITY OF THE COLORADO RIVER, SHE HAS FOREVER ESTOPPED HERSELF FROM ATTACKING THE CONSTITUTIONALITY OF THE BOULDER CANYON PROJECT ACT ON THE THEORY THAT THE RIVER IS NOT NAVIGABLE.

The doctrine of estoppel and the rules of equity are as applicable to the state and public as to individuals, when the acts of the state in its sovereign capacity by way of commission, omission or a line of conduct warrants the application of the principles of equity. Laches, nor limitation founded on mere delay or the unauthorized acts of its agents apparently within the scope of their authority, do not prevail against the government, but otherwise the doctrine applies with equal, if not with greater force than to private citizens. As was said in 54 Fed. 807, United States vs. Willamette, etc.:

"We actually look to the action of a sovereign state to be characterized by a more scrupulous regard to justice and a higher morality than belong to the ordinary transactions of individuals."

That the doctrine of equitable estoppel has been successfully invoked against both state and national government, is borne out by the numerous decisions of state and federal courts. The most extensive discussion of the subject is found in 191 Fed. 257, State of Iowa vs. Carr, et al. The decision was delivered by Justice Sanborn, Van Devanter and Pollock. That case reviews practically all the previous decisions on the subject and most emphatically reaffirms the doctrine and its applicability. We quote from the syllabi and other parts of the decision.

"9. Estoppel. Equitable Estoppel. Estoppel Against Public.

In a controversy between the rights of a state or nation and those of a citizen, while the state or nation is not barred by mere delay, its rights are measured and adjudicated by the doctrine or estoppel and the other principles and rules of law and equity applicable to the like rights of a citizen under similar circumstances.

"10. Estoppel. Equitable Estoppel. Estoppel Against Public.

The equitable claims of a state or nation appeal to the conscience of a chancellor with the same, but with no greater or less, force than would those of a private citizen, and, barring the effect of mere delay, they are judicable in a court of chancery, to whose jurisdiction the state or nation voluntarily submits them, by every principle and rule of equity applicable to the rights of private citizens under like circumstances.

"11. Estoppel. Equitable Estoppel. Estoppel Against Public. Grounds. Title to Land.

By an avulsion of the Missouri river whatever foundation there ever was to the claim of the state

of Iowa to any land in controversy arose in 1877. It gave no notice of and took no action to enforce any such claim until 1904, when it passed an act to sell abandoned river beds and islands therein to the first applicant, and Hannan immediately applied to buy. The plaintiffs and their grantors had then been in possession of the land in controversy for more than twenty years. During this time the state had levied and collected taxes upon this land as theirs and had acquiesced in their possession, and the plaintiffs and their grantors had paid the taxes and had made costly improvements upon the land.

"Held, there was no equity in the claim of the state and it was estopped from maintaining this claim by these facts. 'Nothing can call a court of equity into activity but conscience, good faith and reasonable diligence.'"

It cites with approval the language of Judge Severens of the Sixth Circuit Court of Appeals, at page 268:

"Following the ancient common-law maxim 'nullum tempus occurrit regi,' it has been settled as the rule here that the United States is not affected in respect to its pursuit of remedies by mere delay or general statutes of limitation. But when it sues in equity as a private suitor on a cause of action relating to its proprietary interests, it is held to be affected by those equities which are recognized as fundamental in controversies between private parties. And why should this not be so? It derogates from the dignity and character of the government to suppose that, formed as it is to secure impartial justice between individuals, it may nevertheless in the conduct of its own affairs, without regard to the principles it represents, perpetrate upon its citizens wrongs which it would promptly condemn if practiced by one of them upon another."

It concludes with these words:

"The state cannot be permitted to say that it has slept during all this long period and abandoned its sovereign duties to its citizens, as well as its reciprocal moral obligations to the government which had made it so magnificent a gift. The state is not to be regarded as a mere machine, incapable of intelligence or conscience. And while it is necessary and right to restrain or annul the unauthorized acts of its agents by which its interests might be impaired, yet there must come a time after long-continued acquiescence in public action with knowledge of it, when, in the interest of its citizens, the state itself shall be precluded from despoiling others by the assertion of its original rights."

A well considered case is found in United States vs. Williamette, etc., 54 Fed. 807:

"The government is not ordinarily bound by an estoppel. While individuals may be estopped by the unauthorized acts of their agents, apparently within the scope of their agency, the sovereign power, being the trustee of the people, is rarely, if ever, bound by the acts of its agents; but, while it is true that for the neglect or the illegal or unauthorized acts of its agents the government should not ordinarily be estopped to show the truth, there is good authority, based upon sound reasoning, to support the doctrine that where the government has *acted by legislative enactment, resolution,* or grant, or otherwise than through the unauthorized or *illegal acts* of its agents, and the parties dealing with the government have relied upon the same, and in good faith have so changed their relation to the subject-matter thereof that it would be inequitable to declare such action or grant illegal, the government will be es-

topped. Com. v. Andre, 3 Pick. 224; Cahn v. Barnes, 7 Sawy. 48, 5 Fed. Rep. 326; State v. Milk, 11 Fed. Rep. 397; Pengra v. Munz, 29 Fed. Rep. 830; *Woodruff v. Trapnall*, 10 How. 190. No good reason can be offered why the United States in dealing with their subjects, should be unaffected by considerations of morality and right which ordinarily bind the conscience. The defense of estoppel stands upon different ground from that of laches. It is held that laches is not imputable to the government upon grounds of public policy. The common-law rule that no lapse of time can bar the right of the king is not only recognized in the United States, but is deemed to be applicable with added reason, from the fact that here property is held, not as by a monarch for personal or private purposes, but in trust for the common welfare; and, where the agencies of the people are so numerous and scattered, the utmost vigilance would not save the public from loss; but, when matter of estoppel arises, the observance of honest dealing may become of higher importance than the preservation of the public domain. It was well said in Woodruff vs. Trapnall (10 How. 190) that we naturally look to the action of a sovereign state to be characterized by a more scrupulous regard to justice and a higher morality than belong to the ordinary transactions of individuals.

"If it is true that the matters involved in this suit were investigated, as set forth in the answer, and the patents were thereafter issued, and the defendants, assuming that such action was a final determination of the question of title, and relying on the same, made the expenditures they claim to have made, the government should be estopped from enforcing the forfeiture. The Supreme Court, in reversing the decree in this case, and remanding the cause, expressly refrained from deciding the questions involved in the controversy but reversed the case, that its merits might be investigated; and I hold it to be in harmony with

the construction thus given by the Supreme Court to the provisions of the act of March 2, 1889, as well as conformable to the general principles of equity that should govern the trial of this and all similar cases, to allow the defendants the benefit of all the defenses here pleaded."

Utah Power & Light Co. vs. United States, the Eighth Circuit Court of Appeals, 230 Fed. 328, on page 342, says:

"Nevertheless, there can be no doubt that situations may be and are presented where *both state and nation* enter courts of equity as suitors under conditions which place them upon an equal footing, in this respect, with the private citizen; that where the relations existing are such as to convey actual knowledge of and acquiescence in asserted claims under conditions which would make the subsequent denial of such claims inequitable, the doctrine of equitable estoppel as distinguished from mere laches may be invoked even against the government. The cases just cited are examples of such, but their doctrine cannot be so far extended as to validate the unauthorized appropriation of the public lands upon the mere ground of occupation and improvements made, the knowledge of which is presumed to be brought home to the government through 'fiscal operations so various, and agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses if the doctrine of laches can be applied to such transactions.' The doctrine of equitable estoppel has no application here."

(Idaho) State vs. Twin Falls Co., 166 Pac. 220, on page 230, the court says:

"Generally the doctrine of equitable estoppel does not apply to the government. 16 Cyc. 780.

There are, however, exceptions to this rule. See U. S. vs. Stinson, 125 Fed. 907, 60 C. C. A. 615; U. S. vs. Williamette Valley et al. (C. C.) 54 Fed. 807. In the Stinson Case the court said:

> "'When the government seeks its rights at the hands of a court, equity requires that the rights of others as well should be protected. Carr v. U. S., 98 U. S. 438, 25 L. Ed. 209. The government may not in conscience ask a court of equity to set on foot an inquiry that, under the circumstances of the case, would be an unfair or inequitable inquiry. The substantial considerations underlying the doctrine of estoppel apply to government as well as to individuals.'

"It is very true that the government should not be affected by the laches of its agent, and this doctrine is covered by the general rule. In a case such as the one under consideration, however, the state may properly be estopped from taking conflicting positions at different times without just reason. 2 Pomeroy on Equity Jurisprudence, § 804, states:

> "'Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who has in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.'"

In view of the fact that the Circuit Court of Appeals, 191 Fed. 257, supra, cites so many of the author-

ities on this matter, we deem it unnecessary to again review them here.

It will be noticed from the facts and circumstances in these cases that the government acquiesced in the things done by its citizens in some form or other and permitted the citizens to be placed at a disadvantage to their damage and injury. Certainly if a state cannot avail itself of inequitable conduct as between itself and its citizens, a stronger reason suggests that a state cannot avail itself of inequitable and unfair dealing, and bad faith with the national government. We should certainly expect a "more scrupulous regard to justice and a higher morality."

Let us apply to this case the rules of equitable estoppel as herein set out. Let us concede for the sake of argument, that the State of Arizona has well and sufficiently pleaded the question of the non-navigability of the Colorado River as a basis of this suit, and that such an issue would be a material issue, can it be said, in view of its public records, that coming into a court of equity, it will be heard to maintain that action now? Beginning in its territorial days as far back as 1864 and continuously since, year after year exercising its political power, it has memorialized and petitioned Congress to improve the Colorado River *on the ground that it was a navigable river.* By propaganda, by memorials, by agitation, by advertising, by all the influence of its political powers, it has begged, beseeched and implored Congress to improve this river on the ground that it was a navigable stream. (These acts and supplications are found in the appendix of the brief of the Solicitor General in the motion of the Secretary of the Interior.'

The State of Arizona and its predecessor, the terri-

tory, received some of these benefits. Congress appropriated money and authorized bridges to be built over the river on the theory of its being a navigable river (Appendix to Solicitor Generals brief); therefore, can it be doubted that this long persistent, and for years consistent, policy had its effect in inducing Congress to take the action they have in the Boulder Dam Act? The improvement of the navigability of the Colorado River and the conservation of its flood waters, as provided in the Act, is the realization of the dream, prayers and hopes for over sixty years of the State of Arizona. Can it be said now in good conscience, in good faith, in a scrupulous regard for justice and high morality, that the State of Arizona should be permitted to about face, repudiate all its former conduct and now say the river is unnavigable.

Was Arizona during all these sixty years deceitful in its public dealings with the national Congress or is it acting in good faith now? We submit that it does not lie in her mouth at this late date, under all the rules of high morality, to say that the Colorado River is unnavigable. The position of the parties has been changed to the detriment of the United States. Years of investigation by way of surveys, hearings by Congress on the subject and finally expenditure of vast sums of money in initiating the very thing Arizona has been demanding, precludes the complainant from the relief sought.

We are aware of the rule that estoppel is a matter of defense. The reason for the rule is that certain facts must be established first to invoke the rule, but the case before this court requires no such hearing. The public records of the State of Arizona, which they will not deny, are matters of judicial notice. In

the face of these records, we submit that she is shown to be unable to do so and does not come into this court with "clean hands," a defense which is available on motion to dismiss, (Montgomery's Manual, Sec. 91); and that even if the non-navigability of the Colorado River could in fact be made a material issue in such a case as this, the records upon this subject shown in the Solicitor General's Brief, are such as would preclude any allegation by Arizona that said river is a non-navigable stream.

THE BOULDER CANYON PROJECT ACT AND THE SIX STATE COMPACT ARE CONSTITUTIONAL AND VALID.

1. The Boulder Canon Project Act.

The complainant, in instituting this action, has assumed the burden of overcoming the presumption that exists in favor of the constitutional validity of the act and the compact. That burden is stated in Sweet vs. Rechel, 159 U. S. 380,392, in the following language:

> "In determining whether the legislature, in a particular enactment, has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid, unless it can be clearly shown to be in conflict with the constitution. It is a well-settled rule of constitutional exposition, that if a statute *may* or *may not be, according to circumstances*, within *the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed.* Talbot vs. Hudson, 16 Gray, 417, 422: Fletcher vs. Peck, 6 Cranch, 87, 128; Sinking Fund Cases, 99 U. S. 700, 718."

In respect of the question whether or not in the enactment of the Boulder Canyon Project Act, Congress "has passed the limits of its constitutional authority" in asserting control over the Colorado River, all that would seem to be necessary for the support of the constitutionality of the act is to quote from Wisconsin vs. Duluth, 96 U. S. 379, 386, 387, wherein it is said:

> "We do not feel called upon to make an argument to prove that these statutes of the Congress of the United States, and these acts of the Executive Department in carrying those statutes into effect, constitute an adoption of the canal and harbor improvement started by the city of Duluth, and a taking exclusive charge and control of it. That they amount to the *declaration* of the Federal government, *that we here interpose and assert our power; we take upon ourselves the burden of this improvement, which properly belongs to us,* and that hereafter this work for the public good is in our hands and subject to our control.
>
> "If the merest recital of these acts of Congress, and of the War Department under them, do not establish that proposition, we can have little hope of making it plain by elaborate argument.
>
> "*Nor can there be any doubt that such action is within the constitutional power of Congress.* It is a power which has been exercised ever since the government was organized under the Constitution. The only question ever raised has been how far and under what circumstances the exercise of the power is *exclusive* of its exercise by the States. And while this court has maintained, in many cases, the right of the States to authorize structures in and over the navigable waters of the States, which may either impede or improve their navigation, in the absence of any action of the general government in the same matter, the doc-

> trine has been laid down with unvarying uniformity, that when Congress has, by *any expression of its will, occupied the field*, that action was *conclusive* of *any right* to the contrary asserted under State authority. The adjudged cases in this court on this point are numerous."

In respect of the proposition which opposing counsel have submitted as the major premise upon which their brief in support of the Bill is based, and in support of which they have cited numerous cases; to wit:—

> "That this Court is not bound by such legislative declarations, but may determine the true purpose of legislation by considering its effect, is well settled." (Arizona's Brief 557.)

but little need be said. The cases support the principle stated, but the principle has not the least application to a state of facts such as is shown by Arizona's Bill of Complaint herein, because:

Each and every of the cases cited had to do with legislative acts upon the face of which it affirmatively appeared, from simple inspection of the Act itself, that the purpose or object clearly intended to be accomplished, was a purely local matter which had been reserved to the States by the 10th Amendment, instead of a matter over which jurisdiction had been granted to Congress by the Constitution, as the Bill shows to be the case herein; or one the accomplishment of which had been otherwise prohibited to Congress by the Constitution.

The first case cited is Hammer vs. Dagenhart, 247 U. S. 251, and is a clear illustration of the principle involved in that case. The thing intended to be accomplished by the statute therein involved was, "the

denial of the facilities of Interstate Commerce to those manufacturers in the States who employed children within the prohibited ages." Concerning this object the court said at page 272:

> "Over interstate transportation, or its incidents, the *regulatory power* of Congress is ample, but the *production* of *articles*, intended for interstate commerce, *is a matter* of *local* regulation," (p. 273-274).
>
> "The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such *commerce*, and *not* to give it authority to *control the States* in their *exercise* of the *police power* over *local trade* and manufacture.
>
> "The grant of authority over a purely Federal matter was not *intended to destroy* the *local power* always existing and carefully *reserved* to the States in the *Tenth Amendment* to the Constitution."

The other cases cited in Arizona's Brief, as did the case above cited, involved an assumption of authority by Congress over a local matter, power over which had not been granted to Congress, but on the contrary had been reserved to the States; or it involved statutes upon the face of which it was apparent that the purpose or object intended to be accomplished thereby was such that, if the statute were carried into effect, its operation would clearly violate and be destructive of rights granted or secured by the Constitution. Minnesota vs. Barber, 136 U. S. 313, 319 cited on page 59 of complainants brief, clearly illustrates this class of cases, and, in so doing, gives specific recognition to the presumption of good faith on the part of Congress in the enactment of statutes as follows:

"The *presumption* that this statute was enacted, in *good faith*, for the *purpose expressed* in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is *not repugnant* to the Constitution of the United States. *There may be no purpose* upon the part of a legislature to *violate* the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, *by its necessary operation*, be destructive of *rights granted* or *secured* by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void."

None of the cases so cited, we respectfully submit, have any bearing whatever upon a case such as this, wherein an act of Congress is passed for the declared purpose of exerting a power clearly granted by the Constitution, and the ground of attack against the constitutionality of which is that it "is in *excess* of the *powers granted* to *Congress* by the Constitution," for reasons specified which have to do with nothing else than an alleged conflict of authority between the government of a State and the United States, and wherein, by way of diversion, complainant seeks to defeat the operation of the statute by launching an attack against the motive or purpose of Congress in declaring the purpose for which it is enacted by the use of such language as:

"The *recital* in said Act that the purpose thereof is the improvement of navigation and the reclamation of public land *is* a mere subterfuge and false pretense (Bill, 31)."

With respect to the distinction between the cases cited in complainant's brief, pages 55 to 60, and the

instant case, all that we deem it necessary to do is to call attention to Weber vs. Freed, 239 U. S. 325, 329, 330, and Hamilton vs. Kentucky Distilleries Company, 251 U. S. 146, 161, 162.

2. The Six-State Compact is Constitutional and Valid.

Prior to the time of the formulation and approval of the Colorado River Compact by the Commissioners of the Seven States (including Arizona), Congress had declared its authority and asserted control over the waters of the Colorado River, by the appropriation of monies for its improvement, upon Arizona's own representations and solicitations, as shown on page 40 of the Solicitor General's Brief; and by the enactment of statutes conferring authority for the construction of bridges over the river in which provisions were made for their construction and maintenance in accordance with the provisions of the Act regulating the construction of bridges over navigable waters, as is also shown on page 45 of the Solicitor General's Brief. Therefore, up until the time of the ratification of the Six State Compact and the taking effect of the Boulder Canyon Project Act, the taking effect of which was conditioned upon that ratification, the states through which the river flows had authority to improve, obstruct, use or authorize such use of the waters of the river flowing within their boundaries, as in their discretion they might see fit, in the absence of any assertion of control over the river by Congress.

South Carolina vs. Georgia, 93 U. S. 1, 10.
Illinois Central Railroad vs. Illinois, 146 U. S. 387.
Monongahela Nav. Co. vs. U. S., 148 U. S. 312, 332.

When the Compact was drawn and submitted to Congress for its approval, its consent was the only thing sought, or required, or that could be given, that was not possessed by the States to enable them to bind themselves thereby irrevocably, as shown in our first brief. Had the Congress seen fit simply to have given its unconditioned consent to the Compact without more, no question in respect of the authority of the Seven States to enter into such Compact could have arisen for the simple reason that, Article 1, Section 10 of the Constitution provides for such a procedure, and the subject of the Compact is clearly legal, as shown in our first brief.

But Congress, acting upon the theory that the United States had interests of its own in, and authority for its assertion of control over, the waters of the river, and that it had arid lands of its own to be reclaimed, withheld its consent until, after thorough consideration of the subject, it saw fit to enact the Boulder Canyon Project Act, in Section 13 of which it consented to the Compact, but gave that consent only upon the express conditions, which are contained in Section 4A thereof, which provides that;

> "This act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this act, and no water rights shall be claimed or initiated hereunder and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures UNLESS and UNTIL (1) the states * * *, etc., shall have ratified the Colorado River Compact mentioned in Sec-

tion 13 hereof and the President, by public proclamation, shall have so declared, or

(2) * * * and further until the state of California, by act of its legislature, shall *agree irrevocably* and *unconditionally* with the United States and for the benefit of the states of Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming, as an express *covenant* and *in consideration* of the passage of this act, that the aggregate annual consumptive use of water, * * * for use in the state of California, including all uses under contracts made under the provisions of this act and all water necessary for the supply of any rights which may now exist shall not exceed, etc."

It is apparent from the above language that the conditions precedent contained therein, upon which the taking effect of the Act was made to depend, constituted nothing less than a counter-proposal or offer on the part of the United States government to authorize the states to enter into the Compact, or in the absence of the ability of all of them to agree, to authorize six of said states, including California, to enter into the said Compact, provided they should conform to and comply with the conditions specified in said Act.

Furthermore, as distinct *inducements* for the states to accept its counter-proposal, the Congress, not only consented that the Boulder Canyon Project Act should be subject to the terms of and controlled by the Colorado River Compact, "in the construction, management, and operation of said reservoir, canals, and other works, and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this Act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide," (Bill pages 58, 70); but in Section 13 (b) thereof it expressly provided that:

"The rights of the United States in or to *waters* of the Colorado River and its tributaries howsoever claimed or acquired, as well as the rights of those claiming *under* the United States, shall be *subject* to and controlled by said Colorado River compact."

Six States, including California, complied with the foregoing conditions precedent strictly in accordance with their letter and spirit, and thereby forever waived every right which they or any of them had, or otherwise might have had, in and to the waters of said river that would in any way conflict with the terms of the compact, and thereby forever estopped themselves by solemn binding agreement, and by legislative records of their actions, from ever claiming or attempting to assert any rights to the contrary.

But this was not all. In accepting the counter-proposal of Congress, they did so with full knowledge of, and consent to, the fact that they were accepting the definite counter-proposal upon which Congress had made its consent to the Colorado River Compact depend, to wit, that they could agree to the taking effect of said Compact only by complying with the conditions stated in said act, and not otherwise. Consequently new rights became vested in each of said signatory states upon the ratification of the Compact and the declaration of that fact by the President of the United States, by reason of which the Boulder Canyon Project Act automatically became effective; because, by the action of said states and said United States governments, respectively, said Compact became a binding agreement as between the six states, as shown in our first brief, and for the reasons that:

1. The parties to said compact were competent. The United States Constitution authorizes the States to enter into compacts with each other with the consent of Congress, and leaves Congress free to either grant or withhold its consent to such compacts.

2. There was a lawful subject matter for said compact. The States through which the river flows own the beds and waters of navigable interstate rivers, subject only to the ownership of the United States in, and its authority over the waters of such rivers for the purposes of navigation and commerce, as shown by the authorities, Supra; therefore,

3. The compact between the states was based upon valuable considerations, because each of the states had rights in the waters of the Colorado River to surrender in return for the ratification of the compact by the others and for the consent of Congress to the compact; and in the United States, through Congress, not only had a consent which it might either give or withhold, but it had reclaimable lands in the interests of which it had the sovereign power and right to approve the compact upon the conditions which it proposed and the states accepted.

In other words, the states are expressly authorized by the United States constitution to enter into such compacts, with the consent of Congress, and the United States, acting in its sovereign, political capacity, has full power and authority to consent to such compacts upon such conditions as are contained in said act, and in addition thereto, to bind itself by estoppel through the extension of such invitations and inducements as accompanied its conditional consent in this case.

Insofar, therefore, as the six states are concerned, the rights of the respective parties to said compact

became established and vested in virtue of their own agreement in respect of the waters of the Colorado River; and, insofar as the United States is concerned, it forever estopped itself from claiming that said act is not subject to the terms of said compact, or from depriving the states or any of them, of the rights that became vested in them respectively by virtue of their ratification of the compact in accordance with the conditions specified in said act.

In respect of similar invitations and inducements concerning navigable rivers, this Honorable Court has said:

> "This is something more than the mere recognition of an existing fact; it is an invitation to the company to do the work; and when in pursuance to that invitation and under authority given by the state of Pennsylvania the company has constructed the lock and dam, it does not lie in the power of the state nor of the United States to say that such lock and dam are an obstruction and wrongfully there, or that the right to compensation for the use of this improvement by the public does not belong to its owner, the navigation company."

Monongahela Navigation Co. vs. U. S., 148 U. S. 312, 335.
Lewis Blue Point Oyster Co. vs. Brigg, 229 U. S. 69.
U. S. vs. Chandler-Dunbar Co., 229 U. S. 53, 62.

(b) The United States has exercised such authority and is now in possession of the river, dam and reservoir sites, actually executing the Boulder Canyon Project Act, as shown by Arizona's own Bill of Com-

plaint, and she is doing so under constitutional authority to improve the navigability of the river in the exercise of her political powers, as is shown by Arizona's Brief; consequently, whether or not the action of Congress and the Secretary of the Interior are commendable, and whether the Boulder Canyon Project Act is within Constitutional limitations, neither this Honorable Court nor any other Court has any authority or jurisdiction to enjoin the execution thereof for the reasons stated in Mississippi vs. Johnson, 4 Wall. 475; 71 U. S. 475, wherein it is said:

> "It is true that in the instance before us the interposition of the court is not sought to enforce action by the executive under constitutional legislation, but to restrain such action under legislation alleged *to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion.*"
>
> *"The Congress is the legislative department of government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed are, in proper cases, subject to its cognisance.*"

As shown herein before, the foregoing principle has received specific application by this Honorable Court in Wisconsin vs. Duluth, 96 U. S. 379, wherein the facts, in substance, were identical with the facts alleged in paragraphs XX, XXX, XXXI, XXXII, and XXXIII, of the Bill of Complaint herein.

(c) If the Colorado river is in fact a navigable stream, the title of Arizona to the bed and waters

thereof is but a bare, technical title which she holds in trust for the public use and benefit, but, as herein shown, that title is clearly subject to the exclusive authority of Congress for the purposes of navigation.

This subject is discussed in complainant's brief from page 72 to page 80, wherein opposing counsel quote from a number of cases from which they deduce the conclusions that:

> First. "If and wherever navigable, the Colorado River *belongs* to and is owned by the State in which it is situated. The State in its *sovereign capacity* owns the *water in the river*, the bed of the river, and its bank to high water mark. *This is a full proprietary ownership.*" (Arizona's Brief, page 78.)
>
> Second. "Even assuming the Colorado River to be navigable, *the United States does not own it*, and has no right to use it or control it for any purpose, except that of regulating commerce by improving navigation. *Not being the owner*, the United States *cannot*, for any purpose or upon any pretext, sell or dispose of the water in the river or the land under it. The power to *direct or authorize any such use, control, sale or disposal of the water in or the land under the river has not been delegated to Congress by the Constitution of the United States.*" (Arizona's Brief, pages 78-79.)

The argument which the complainant bases upon the foregoing premises is so thoroughly disposed of in United States vs. Chandler-Dunbar Company, 229 U. S. 53, and Illinois Central Railroad Company vs. Illinois, 146 U. S. 387, and in the cases cited by us, *supra*, as to require no attention from us, further than to say that the argument made is *not* aimed at the six

defendant states or the Colorado River Compact, but is confined to an attack upon the authority of the Secretary of the Interior to execute the Boulder Canyon Project Act, which is made subservient to the terms of the Compact. From this argument it is apparent that the complainant does not even contend that it is in any sense subject to any direct injury by reason of the existence of the Compact, or on account of anything done or threatened to be done by the defendant states or any of them.

For the foregoing reasons, we respectfully submit, that:

(a) The six-State Compact is a clearly constitutional and valid compact;

(b) Neither the bill of complaint nor the brief of the complainant either assert anything to the contrary or make any pretence of having alleged any cause of action in which any direct attack is made against, or in which the constitutional validity of the compact is assailed in any respect;

(c) The only apparent reason for having made the six states parties defendant to the bill of complaint is due to the fact that the Boulder Canyon Project Act, for relief against the execution of which an injunction is sought, is, by its terms, made subject to the terms of the compact, and the interest of the states therein give rise to the contention that they are proper parties defendant to this suit.

THE UNITED STATES IS AN INDISPENSIBLE PARTY.

The possession of the Colorado River and the work being prosecuted therein by the Secretary of the Interior are not the possession and work of the Secretary

himself as an individual. The river is the property of the United States for the purpose for which possession has been asserted and the work is being prosecuted.

> "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the *public property of the nation*, and subject to all the requisite legislation of Congress."
>
> U. S. vs. Chandler-Dunbar Co., 229 U. S. 53, 63;
> South Carolina vs. Georgia, 93 U. S. 4, 10;
> Gilman vs. Philadelphia, 3 Wall 7, 124.

Therefore, in his assumption of possession and control over the river, the Secretary is not acting in the capacity of a private citizen of the state, but as a representative agent of the United States government. The suit is, for that reason, in effect one against the United States.

State of Louisiana vs. McAdoo, 234 U. S. 627.

In state of Mississippi vs. Johnson, 4 Wall, 475, 501, it is said:

> "It is true that a state may file an original bill in this court, and it may be true, in some cases, that such a bill may be filed against the United States. But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us.
>
> "It has been suggested that the bill contains a

prayer that, if the relief sought cannot be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee. But it is plain that relief as against the execution of an act of Congress by Andrew Johnson is relief against its execution by the President. A bill praying an injunction against the execution of an act of Congress by the incumbent of the presidential office cannot be received, whether it describes him as President or as a citizen of the state.

"The motion for leave to file the bill is, therefore, denied."

CONCLUSION.

Therefore for the reasons hereinbefore set forth these defendants respectfully submit that the Bill of Complaint be dismissed.

Respectfully submitted,

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